(18,637.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1902.

No. 409.

ROBERT L. WINEBRENNER, APPELLANT,

vs.

EDWARD C. FORNEY.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF OKLAHOMA.

INDEX.

	Original.	Print.
Citation and service	a	1
Petition in error	1	1
Case-made from district court	2	2
Caption	2	2
Petition	2	2
Exhibit C—Letter of Secretary of Interior to Commissioner of General Land Office, January 18, 1897	7	5
Motion for review	8	6
Motion to require plaintiff to complete petition, &c	11	8
Order granting leave to amend petition	12	9
Amended petition	12	9
Exhibit A—Letter of Acting Commissioner to register and receiver at Perry, Oklahoma, July 6, 1895	17	12
B—Letter of Secretary of Interior to Commissioner of General Land Office, January 18, 1897	21	15
C—Motion for review	23	16
Demurrer to amended petition	25	17
Order taking demurrer under advisement	27	18
Order sustaining demurrer, &c	28	19
Second amended petition	29	20

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., OCTOBER 11, 1902.

	Original.	Print
Exhibit A—Decision of register and receiver	35	24
B—Letter of Acting Commissioner to register and receiver, July 6, 1895	39	27
C—Letter of Secretary of Interior to Commissioner of General Land Office, July 18, 1897	44	30
D—Motion for review	45	31
E—Patent to Forney	47	32
Demurrer to second amended petition	48	33
Judgment	50	34
Acceptance of service of case-made, &c	51	35
Judge's certificate to case-made	52	35
Affidavit of S. H. Harris as to cost of case-made	53	36
Order submitting case	55	36
Judgment	56	37
Opinion	57	37
Petition of appeal	63	42
Assignment of error	65	43
Affidavit of value	67	44
Order allowing appeal	69	44
Bond on appeal	71	45
Clerk's certificate	75	47

a In the Supreme Court of the United States.

ROBERT L. WINEBRENNER, Plaintiff in Error,
vs.
EDWARD C. FORNEY, Defendant in Error.

The President of the United States to Edward C. Forney, Greeting:

You are hereby cited and admonished to be and appear at a session of the Supreme Court of the United States, to be held in the city of Washington on the sixteenth day of August, next, pursuant to an appeal filed in the office of the clerk of the supreme court of the Territory of Oklahoma, wherein Robert L. Winebrenner is appellant, and you are appellee, to show cause, if any there be, why the judgment rendered against the said appellant as in said appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties.

Witness, the Honorable John H. Burford, chief justice of the supreme court of Oklahoma Territory, this 18th day of July, 1902.

JNO. H. BURFORD,
Chief Justice of the Supreme Court of Oklahoma Territory.

Attest:
[Seal Supreme Court, Territory of Oklahoma.]
BENJ. F. HEGLER, *Clerk.*

I hereby accept service of the foregoing citation, this 25 day of July, A. D. 1902.

DALE & BIERER,
Attorney- for Edward C. Froney.

[Endorsed:] 1169. Winebrenner *vs.* Forney. Citation. Filed Jul- 29 1902 Benj. F. Hegler, clerk supreme court, by —— ——, deputy.

1 In the Supreme Court of the Territory of Oklahoma.

ROBERT L. WINEBRENNER, Plaintiff in Error,
vs.
EDWARD C. FORNEY, Defendant in Error.
} Petition in Error.

Plaintiff in error complains of defendant in error and says that a certain action was heretofore pending in the district court of Kay county, Oklahoma Territory, wherein this plaintiff in error was plaintiff, and defendant in error was defendant, which said action was on the 7th day of October, 1901, finally terminated by a final order, judgment and decree of the said court dismissing the action of plaintiff in error against defendant in error and adjudging that this plaintiff in error pay the costs of said action; that there is error in said proceeding and judgment in this:

I.

That the court erred in sustaining the demurrer of defendant in error to the amended petition of plaintiff in error.

II.

That said court erred in sustaining the demurrer of defendant in error to the second amended petition of plaintiff in error.

III.

That said court erred in dismissing said cause at the cost of plaintiff in error, and rendering judgment against plaintiff in error.

Wherefore plaintiff in error prays that said erroneous judgment, order and decree be set aside and held for naught; that he be restored to all things which he has lost by reason thereof and for costs of this proceeding in error.

S. H. HARRIS,
Attorney for Plaintiff in Error.

2 Filed Dec. 6, 1901.

BENJ. F. HEGLER,
Clerk Supreme Court,
By JESSIE PARDOE, *Deputy.*

In the District Court of Noble County, Oklahoma Territory.

ROBERT L. WINEBRENNER, Plaintiff,
vs.
EDWARD C. FORNEY, Defendant.
} Case-made.

Be it remembered, that heretofore, to wit, on the 26th day of September, A. D. 1900, the said plaintiff, Robert L. Winebrenner, commenced his action against said defendant, by filing in the district court of Kay county, his petition, which is in words and figures following to wit:

In the District Court in and for Kay County, Oklahoma Territory.

ROBERT L. WINEBRENNER, Plaintiff,
vs.
EDWARD C. FORNEY, Defendant.
} No. —.

Petition.

Plaintiff complains of said defendant and says: that he is a natural-born citizen of the United States and on the 16" day of September, 1893, was over the age of twenty-one years and was then the head of a family; that prior to the opening of the Cherokee Outlet to settlement on September 16", 1893, plaintiff had never entered upon
3 or occupied any of said lands, embraced in the lands known as Cherokee lands, was not then and is not now the owner of the one hundred and sixty (160) acres of land and prior to the opening of said Outlet to settlement, plaintiff procured a booth certificate, under the rules and regulations prescribed by the Honorable Secretary of the Interior and at the time of the opening of said country to settlement, ever since said time and at the present time, plaintiff was and is in all respects qualified under the laws of the United

States to take hold and acquire title to lands opened for homestead and settlement as aforesaid.

That on the 22nd day of September, 1893, this plaintiff settled upon and occupied the southwest quarter (S. W. ¼) of section nineteen (19) in township twenty-six (26) north of range one (1) east of the Indian meridian being a portion of the lands opened to settlement in said Outlet on the said 16th day of September, 1893; that the plaintiff then and there set his stake on said land, with his name inscribed thereon and immediately commenced digging a well on said premises; that said settlement was made with the intention, on the part of this plaintiff and for the purpose of acquiring the same as a homestead, by virtue of the laws of the United States; that plaintiff has ever since continued to occupy and reside on said premises, and to cultivate and improve the same in compliance with the homestead laws.

That shortly after said settlement, plaintiff placed a wire fence entirely around said premises and commenced to cultivate and improve, for the purpose aforesaid; that shortly after said settlement and during the spring and summer of 1894, this plaintiff dug a good well on said premises and put about sixty (60) acres *out* cultivation and also built two houses on said premises and made other lasting improvements thereon, all of the value of about two hundred ($200.00) dollars, not included in said valuation, the cost of breaking and cultivating said land.

Plaintiff further says, that on the 23" day of September, 1893 the defendant disregarded the rights of this plaintiff as prior set-
4 tler on and occupant of said lands, made a homestead entry thereon at the United States land office at Perry, Oklahoma; that shortly after the making of homestead entry, said defendant forcibly *through* down and distroyed a portion of plaintiff's fence placed around said premises as aforesaid and plaintiff was by the forcible act of the defendant reduced to the possession of only about ninety (90) acres of said land and defendant has occupied the remainder of said land since some time during the year 1894 until the present time.

Plaintiff further says that within three months after the date of his settlement upon said premises he filed in the said land office an affidavit of contest on the said homestead entry of said defendant alleging in substance, that he was the prior settler upon said lands and that the defendant was not qualified to make a homestead entry, for the reason that he had entered upon the country known as the Cherokee Outlet prior to 12 o'clock, central standard time of September 16 A. D. 1893 and that hour of opening said country to settlement, was made the outer boundaries known as Cherokee Outlet and make the one *one* hundred (100) feet reservation around and immediately within said other boundaries, and at the time said country was opened to settlement, defendant was on or near the western boundaries of that portion of said Cherokee Outlet, known as the Ponca Indian reservation; that said contest came on for hearing in said land office, on the — day of ——, 189– and then and there proceeded to trial and afterwards on the — day of —— 189– said cause was decided by the honorable register and receiver of

said land office in favor of said plaintiff. A true copy of said decision is hereto attached under mark of Exhibit "A" and made a part of this petition.

That thereafter in due time and form the defendant herein *applied* from said office and decision to the honorable Commissioner of the General Land Office and afterwards and on the — day of ——, 189–, the said Commissioner of the General Land Office rendered his decision in said case in favor of this plaintiff; that the said defendant in due time and form appealed from said decision to
5 the honorable Secretary of the Interior and thereafter on the — day of —— 1897 the said Secretary rendered his decision in said case in favor of the defendant herein and reversing the decision of the honorable Commissioner.

A true copy of said decision of said Secretary is hereto attached under mark of Exhibit "B" and made a part of this petition; that thereafter in due time and form this plaintiff filed his motion for — from said decision of the Secretary of the Interior, got on the 11" day of August, 1897 and the honorable Secretary of the Interior rendered his decision upon said motion denying the same and affirming the former decision in said case. A copy of said decision is hereto attached under mark*ed* of Exhibit "C" and made a part of this petition.

Plaintiff further states that at trial of the said commissioners of the United States land — at Perry, Oklahoma it was proven conclusive- and the register and receiver found the facts to be, that the defendant herein entered upon the country known as the Cherokee Outlet *and* hereby set forth and charged and also heard the decision; that said defendant was disqualified by reason of said unlawful entry to acquire said land as a homestead; that the honorable Commissioner of the General Land Office upon appeal of said decision found and determined as matter of fact that the defendant herein had entered upon the said Cherokee Outlet as herein charged and also found and determined that by reason of unlawful entry, said defendant was disqualified to acquire said lands as a homestead; that upon appeal of said case to the honorable Secretary of the Interior and upon the hearing and determination of plaintiff's motion for review, the said Secretary found and determined as a matter of fact, that said defendant had entered upon the country known as Cherokee Outlet and herein charged by the Secretary then and there misunderstood and missupplying the law with reference to the qualifications of the defendant herein, erroneously and unlawfully held and decided, that said defendant was not disqualified to acquire title to said land under the homestead law of the United States by reason of said unlawful entry upon lands aforesaid.

6 Plaintiff further says; that in all of said decision it was found and determined that this plaintiff had more and better rights to said lands over and above the present right, then the defendant herein and but for the erroneous and unlawful decision of the honorable Secretary of the Interior said land *was* by the Land

Department of the United States would have been *re*warded to this plaintiff.

Plaintiff further says, that he has resided upon said lands, cultivated and improved the same in all respects in compliance with the laws of the United States for more than five years and during said time and does at this time claim the same as his homestead under and by virtue of the laws of the United States.

Plaintiff further says that on or about the 31st day of July A. D. 1900 defendant herein made final proof of his residence upon, and claims said land and filed the same in the local land office at Perry, Oklahoma as required by law; that he then and there paid the fees of the register and receiver and received his final receipt; that on the — day of ——, 1900, said defendant received from the Government of the United States its patent conveying to him the full title to the land in question; that said final proof was accepted and said receipt issued and said patent issued and delivered to said defendant in violation of the rights and claim of this plaintiff in and to said lands and said patent, and apparent title of the said defendant is wholly void, by reason of the facts aforesaid; that said defendant still holds and claims said premises under said void patent and claims all ownership.

Wherefore plaintiff prays that the said apparent title and ownership of defendant be decreed to be a trust for the benefit of this plaintiff; that plaintiff be decreed to be the absolute owner of the legal and equitable title in and to said premises and that defendant be required to convey the same to this plaintiff and if defendant fails or refuses to make such conveyance, then that the decree of this court stand by such conveyance for other proper and equitable relief including the costs of this action.

S. H. HARRIS,
Attorney for Plaintiff.

7 EXHIBIT "C."

DEPARTMENT OF THE INTERIOR.
WASHINGTON, *January 18th*, 1897.

ROBERT L. WINEBRENNER and JOHN T. SMITH
vs.
EDWARD C. FORNEY.

The Commissioner of the General Land Office.

DEAR SIR: On September 23rd, 1893, Edward C. Forney made homestead entry for the S. W. ¼ of sec. 19, tp. 26, N. R. 1 E., I. M. Perry, Oklahoma. On October 7th, 1893, Robert L. Winebrenner filed a contest against the entry of Forney, alleging that Forney was disqualified because he entered the race from the Ponca reservation. Winebrenner also claimed prior settlement on said land. On November 3rd, 1893, John T. Smith also filed a contest alleging prior settlement and alleging that Forney was disqualified for the reason stated by Winebrenner.

The cases were consolidated and heard September 12th, 1894 On the day of the hearing Forney moved to strike from the contest affidavit the charge of disqualification, as it was insufficient upon which to order a hearing. The motion was sustained by the register on the authority of two letters of the Commissioner dated respectively October 3rd, 1893, in the case of McManus *vs.* Burns, and November 5th, 1894, in the case of Hartshorn *vs.* Young, which held that the law did not disqualify from entering from an Indian reservation.

On November 17th, 1894, the local office found that Forney was not disqualified by having entered the Territory from the Ponca reservation, and that neither Winebrenner nor Smith had made a valid settlement at the date of Forney's entry.

On July 6th, 1895, your office, speaking of Forney's disqualification said:

8 Your decision that Forney is a qualified entryman is in accordance with the ruling of this office in force at the time. That ruling has, however, been reversed by the Hon. Secretary. (Cagle *vs.* Mendenhall, 20 L. D. 46.)

"The testimony shows that Forney made the race from the Ponca reservation, and according to that decision, he is therefore disqualified from acquiring title to said land, and you- decision is reversed."

As between Smith and Winebrenner your office found that the latter had the superior rights. You then decreed that Forney's entry be held for cancellation and the land held subject to Winebrenner's right of entry. From this Forney and Smith both appealed.

On December 6th, 1896, the department overruled the decision in the case of Cagle *vs.* Mendenhall (20 L. D. 46), upon which your office decision is based, by ruling that entering from and Indian reservation did not disqualify a person to make a homestead entry.

Brady *vs.* Williams, 23 L. D.

In view of this and the failure on the part of contestants by preponderance of evidence to show prior settlement, your office decision is reversed, and the entry of Forney will remain intact.

The papers in the case are herewith returned.

Very respectfully, DAVIS R. FRANCIS, *Secretary.*

EXHIBIT.

DEPARTMENT OF THE INTERIOR,
WASHINGTON, *August 11th*, 1897.

ROBERT L. WINEBRENNER and JOHN T. SMITH
vs.
EDWARD C. FORNEY.

Motion for review.

Commissioner of the General Land Office.

9 SIR: The department on January 18th, 1897, rendered a decision in the case of Robert L. Winebrenner and John T.

Smith *vs.* Edward C. Forney, involving the S. W. ¼ of sec. 19, T. 26, N. R. 1 E., Perry land district, O. T. reversing the decision of your office dated July 6th, 1895, and holding that the defendant Forney was not disqualified from acquiring lands in Oklahoma by reason of having entered the Territory from the boundary of an adjacent Indian reservation. Winebrenner and Smith respectively have filed motions for review of said case. The allegations, (aggregating forty in number), accompanying said motion content primarily that the departmental decision upon which the case at bar was ruled (Brady, *et al. vs.* Williams, 23 L. D. 533), was erroneous and ought to be overruled. Said case of Brady, *et al. vs.* Williams was decided by the department on review, July 24th, 1897, and the doctrine therein enunciated reaffirmed.

It is now alleged that there is a distinction between the Brady-Williams case and the case now under consideration inasmuch as in the former case "Brady entered from the one-hundred-foot strip and not from the reservation."

This allegation is answered by the original departmental decision in the Brady-Williams case, (23 L. D. 533), and answered directly by the same case on review, (25 L. D.) which says: "It is argued that those entering from that side were transfressors because of having reached the strip through an Indian reservation; but the fact that one is a transgressor on an Indian reservation would not, of itself, disqualify him from making homestead entry. No such result is disclosed in the statutes and none such is found in any law or treaty."

The allegation last above referred to is found in the motion filed by counsel for Smith. On the contrary counsel for Winebrenner alleges that Forney was disqualified, notwithstanding the departmental decision in the case of Brady, *et al. vs.* Williams, for the reason that at twelve o'clock noon central standard time Sept. 16th, 1893, said Forney was upon and within the lands opened to settlement on said date, at a point immediately west of Ponca reservation.

Winebrenner's affidavit makes no such charge as above, but on the contrary alleges that said Forney, at twelve o'clock noon of September 16th, 1893, was in township 25, N. R. 1 E. of I. M., and entered the lands opened to settlement from the position in said T. 25 R. 1 E. I. M.

T. 25, N. R. 1 E. is in the Ponca Indian reservation. The contestant cannot, on motion for review, for the first time, set up a new charge—certainly not one inconsistent with the charge formerly made.

The remaining allegations in each of the motions for review relates to the question of priority of settlement regarding which nothing is offered that has not heretofore been presented to and considered by the department.

The motion and accompanying papers are herewith returned.

Very respectfully, THOS. RYAN,
Acting Sec'y.

On the back of which petition is endorsed the following:
"Filed Sept. 26–1900. Jay E. Pickard, clerk, by E. A. Burke, deputy."

And be it further remembered that thereafter to wit, on the 23rd day of October, A. D. 1900, the defendant, by his attorney, J. F. King, filed his motion in said cause, which said motion is in words and figures as follows, to wit:

In the District Court of Kay County, Oklahoma.

ROBERT L. WINEBRENNER, Plaintiff,
vs.
EDWARD C. FORNEY, Defendant. } No. 1645.

11 *Motion.*

Comes now the defendant in the above-entitled cause, and moves the court to require plaintiff to fill in the blank dates in his petition so as to show the dates on which the contest in the local land office was tried and the date on which the same was decided. That plaintiff be required to attach to his petition his alleged Exhibit A.

That plaintiff be required to fill in the blanks in his petition showing the date of the Hon. Commissioner's and the Hon. Secretary's decision of the contest set forth in plaintiff's petition.

That plaintiff be required to state wherein the Hon. Secretary misunderstood and misapplied the law as to the disqualification of the defendant.

That plaintiff be required to attach to his petition a copy of the decision of the Hon. Commissioner referred to in his petition.

That plaintiff be required to state before whom and in what land office the contest mentioned in his petition was tried and decided.

That plaintiff be required to state on what date patent for the land mentioned in his petition was issued to defendant.

That plaintiff be required to attach to his petition a true and correct copy of the decision of the Hon. Secretary and his decision on the motion for review mentioned in plaintiff's petition.

J. F. KING,
Attorney for Plaintiff.

On the back of which said motion appears the following filemarks:
"Filed Oct. 23, 1900 Jay E. Pickard, clerk, by E. A. Burke, deputy."

12 Be it further remembered that, to wit, on the 5th day of March, A. D. 1901, this cause coming on for hearing on the motion of defendant for plaintiff to make his petition more definite and certain, and the court being fully advised in the premises, the following entry was made, as the order of the court, on the journal, in words and figures as follows, to wit:

ROBERT L. WINEBRENNER, Plaintiff,
vs.
EDWARD C. FORNEY, Defendant. } No. 1645.

Now on this 5th day of March, A. D. 1901, this cause comes on for hearing on motion of the defendant to require plaintiff to make his petition more definite and certain. Plaintiff appears by S. H. Harris, his attorney and defendant appears by J. F. King, his attorney;

Thereupon said motion is confessed by the plaintiff and the plaintiff asks leave of court for time to amend his petition.

Thereupon the plaintiff is granted leave to amend his petition herein on or before the 11th day of March, 1901.

(Journal No. 8, page 102.)

And be it further remembered that thereafter, to wit, on the 18th day of March, 1901, leave of court first being had and obtained, plaintiff filed his amended petition in said cause, which amended petition is in words and figures, as follows, to wit:

In District Court of Kay County, Territory of Oklahoma.

ROBERT L. WINEBRENNER, Plaintiff,
vs.
EDWARD C. FORNEY, Defendant. } Amended Petition.

13 Now comes the plaintiff, by leave of court first had and obtained, and files this his amended petition and for cause of action against said defendant alleges and says:

That he is a native-born citizen of the United States of America; that on the 16th day of September, 1893, he was over twenty-one years of age and the head of a family; that prior to the opening of the country known as the "Cherokee Outlet," on September 16th 1893, this plaintiff had never entered upon or occupied any portion of the lands embraced in said "Outlet;" that plaintiff was not then and is not now the owner of one hundred and sixty acres of land in any State or Territory of the United States or anywhere else; that prior to the time of said "opening" plaintiff procured a booth certificate entitling him to enter a homestead in said Outlet, and at the time of the opening said country to settlement plaintiff was and at all times since has been qualified in all respects to take and hold land in said Outlet as a homestead, under the homestead laws of the United States and under the laws, rules and regulations relative to the opening of said country to settlement.

That on the 16th day of September 1893, at the hour of twelve o'clock, noon, central standard time, this plaintiff entered upon said country for the purpose of locating and claiming a homestead as aforesaid, and immediately thereafter entered upon and occupied the southwest quarter of section nineteen, in township twenty-six, north, range one, east of the Indian meridian, in Kay county, Territory of Oklahoma, being a portion of the lands opened to settlement as before described; that shortly after entering upon said land this plaintiff, beliving that said land had been lawfully occupied and

claimed by some other person, left the same, but returned thereto on the 22nd day of September, 1893, after being satisfied that said land was not lawfully occupied and claimed under the laws of the United States; that on said 22nd day of September this plaintiff occupied said land as a homestead under the laws governing the holding and acquiring of title to said lands and has ever since
14 held and claimed said land as a homestead; that plaintiff has ever since occupied said land and cultivated the same in accordance with the laws of the United States and is now fully entitled to a patent therefor by virtue of such compliance with the laws in relation to taking, holding and acquiring said land as a homestead.

That immediately after said settlement and occupancy of said land and as a part of the work performed thereon by this plaintiff pursuant to the homestead laws of the United States this plaintiff fenced said claim, dug a well thereon, put about sixty acres thereof in cultivation, built a residence thereon for himself and family wherein he has since resided.

Plaintiff further says that on the 23rd day of September, 1893 the defendant, disregarding the rights of this plaintiff as the first legal settler upon and occupant of said land, made a homestead entry for said land at the United States land office at Perry, O. T., the said land being located within the district for which said land office was located; that shortly after making said homestead entry the defendant threw down a portion of plaintiff's fence and took possession of about seventy acres of said land, and has ever since retained possession thereof to the damage of this plaintiff in the sum of $800.00.

Plaintiff further says that within three months after making settlement upon said land as aforesaid he filed a contest against the said homestead entry of defendant, in the said United States land office, alleging in substance that he settled upon and occupied said land before the settlement or homestead entry of defendant and that the said defendant was not qualified to make homestead entry of or settlement upon said land for the reason that he, the said defendant, entered upon and occupied the country known as the Cherokee Outlet prior to twelve o'clock noon, central standard time of the 16th day of September 1893 and subsequent to the act of Congress and proclamation of the President opening said lands to settlement and entry for homestead purposes and that at the hour of opening said country to settlement the said defendant was within the
15 outer boundary of said country and within the one-hundred-foot strip surrounding the said outer bound-ry and immediately within the said outer bound-ry and was then and there upon the western bound-ry of that part of said Outlet known as the Ponca Indian reservation; that a hearing and trial was ordered upon said contest and, on the 12th day of November, 1894 said contest came on for trial and was tried before the hon. register and receiver of the said land office at Perry, O. T., and upon said trial and consideration of the evidence offered on behalf of the respective parties, the said register and receiver rendered their decision in favor of the said defendant and against this plaintiff; that in due time and form

this plaintiff appealed from said decision to the Hon. Commissioner of the General Land Office and thereafter and on the 6th day of July, 1895, the said Commissioner reversed the said decision of the local office and found that this plaintiff was the first legal settler upon said land and that plaintiff was entitled to the land as a homestead by virtue of his compliance with the laws of the United States in that regard; that the said Commissioner also found and determined that the said defendant was within the outer boundaries of the said lands as hereinbefore set out and that as a matter of law he was thereby disqualified to acquire title to said land or to make a valid homestead entry thereon. That the local office had also found that the said defendant had entered upon said Outlet as herein set forth but erroneously determined that such fact did not disqualify him from taking, holding and acquiring title to said land, and the said decision of the Hon. Commissioner corrected said erroneous decision and conclusion of law.

A true copy of said decision of the Commissioner of the General Land Office is hereto attached, marked Exhibit "A" and made a part of this petition.

That the said defendant thereafter appealed from said decision of the Commissioner to the Hon. Secretary of the Interior; that upon consideration of said cause upon said appeal the said Secretary approved the findings of fact that the said defendant had entered upon the said Outlet as hereinbefore set out, but the said Secretary then and there misunderstood and misapplied the law in relation to the qualification of defendant to take and hold said land and on the 27th day of January, 1897 the said Secretary erroneously held, decided and determined that the said defendant was not disqualified on account of the facts aforesaid and held and determined that the said defendant settled upon and improved said land before the settlement and improvement of this plaintiff and filed his homestead entry thereon prior to the settlement and improvements of this plaintiff.

16

Plaintiff further says. that in all of said decision it was found and determined that this plaintiff was the prior settler upon said land but for the homestead entry and settlement of said defendant.

A true and exact copy of the decision of the said Secretary is hereto attached as Exhibit "B" and made a part hereof.

Plaintiff further says that in due time and form he filed his motion for a review of the said decision of the Secretary of the Interior urging the error of law aforesaid and afterwards and on the 11th day of August, 1897, the said Secretary rendered his decision upon said motion, and in said decision again erroneously and unlawfully held and determined that the facts herein set out and found by the various departments of the Land Department of the United States in reference to the entry of defendant upon the lands in question, did not disqualify the said defendant to take, hold and acquire title to said land under the laws of the United States; that this plaintiff, after having complied with all the laws of the United States and being found to have so complied with said laws, and after being fully entitled to a patent for said land was unlawfully and wrongfully

denied his rights in the premises and the homestead entry of th said defendant was held intact and said land awarded to him.

A true and exact copy of said decision of the Secretary upon the said motion for review is hereto attached. marked Exhibit
17 "C" and made a part of this petition.

Plaintiff further says. that on the 31st day of July 1900 said defendant made his final proof of residence upon and cultivation of said land, and, notwithstanding the disqualification of defendant aforesaid, said final proof was approved and final receipt issued to said defendant for said land and this plaintiff finally, unlawfully, and wrongfully deprived of said land and his rights in the premises.

Wherefore plaintiff prays for judgment against the said defendant declaring the title so wrongfully issued to him by the Government of the United States to be held in trust for the benefit of this plaintiff and that defendant be required to execute a proper conveyance of said land to this plaintiff, and in the event of the failure or refusal of defendant to execute said conveyance that the decree of the court stand in lieu thereof.

Plaintiff further prays for judgment for the rents and profits of said land in the sum of twenty-five hundred dollars, for the costs of this action and all proper and equitable relief.

S. H. HARRIS,
Attorney for Plaintiff.

EXHIBIT "A."

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *July 6th*, 1895.

ROBERT L. WINEBRENNER and JOHN T. Smith *vs.* EDWARD C. FORNEY.	Involving H. E. No. 628, Made Sep. 23rd, 1893, for the S. W. ¼, Sec. 19, Town. 26 N., R. 1 E., I. M.

Register and receiver, Perry, O. T.

18 GENTLEMEN: On September 23rd 1893 Edward C. Forney made H. E. No. 628 for the S. W. ¼ sec. 19, town. 26, N. R. 1 E. I. M.

On October 1*th*, 1893, Robert L. Winebrenner filed an affidavit of contest against said entry alleging that Forney is disqualified by reason of having entered "the race" from the Ponca Indian reservation; also that he, (Winebrenner), on September 22nd, 1893, "went upon said tract of land with the intention of claiming the same as a homestead under the homestead laws and that he established his residence thereon at five o'clock of said day, and that he made certain improvements thereon, to wit, a certain well and erected his tent thereon, and that he has ever since said time so continued to occupy the same and reside thereon, and that his right to said tract *are* superior and prior to the rights of all other parties."

On Nov. 3rd, 1893, John T. Smith filed an affidavit of contest

against said entry, alleging that he made a *bona fide* settlement upon the land in controversy, prior to the entry and settlement of Forney, and that Forney made the race from the Ponca Indian reservation.

On Dec. 9th, 1893, Thos. E. Barr filed an affidavit of contest, alleging settlement on the day of the opening and that his was the first legal settlement on the land.

These cases were consolidated and set for trial May 18th, 1894. On this date the parties all appeared and by agreement a continuance to September 3rd, 1894, was ordered. The case finally went to trial Nov. 12th, 1894. The contestant Barr failed to appear and his contest was dismissed. The testimony shows that he sold his improvements to Winebrenner in April 1894, for $250.00.

On November 17th, 1894, you rendered a decision in favor of Forney, holding, in substance, that he is not disqualified by reason of having entered the race from the Ponca reservation, and that neither Winebrenner or Smith had made a valid settlement at the date of Forney's entry. Winebrenner and Smith both appeal from that decision. Forney also appeals from some of your findings of fact which he deems prejudicial to his case.

19 Your decision that Forney was a qualified entryman was in accordance with the ruling of this office in force at the time. That ruling has, however, been reversed by the honorable Secretary. (Cagle *vs.* Mendenhall, 20, L. D. 466.)

The testimony shows that Forney made the race from the Ponca reservation, and according to said decision, he is therefore disqualified from acquiring title to said land and your decision is reversed.

There remains to be determined the question of priority as between Winebrenner and Smith.

The testimony on this point is rather voluminous and much of it irrelevant and contradictory. They were both in the race on the day of the opening. Smith admits that Forney reached the land first, (at 12.25) but states that when he arrived, (about two o'clock), and saw Forney's stake with the time of arrival written on it, he concluded that he, (Forney) must have made the race from one of the reservations on the east and was therefore an illegal settler, and he therefore claimed the land himself and stuck a stake about 18 inches high and wrote his name on an empty tomato can and put it on the top of the stake. He did nothing else at that time but returned immediately to his home in Arkansas City. He states that on the 22nd of September he returned to the land and dug a hole about three feet in diameter and 18 inches deep and stuck another stake. The question as to the date of the digging of this hole appears to have been regarded by the parties as of great importance, and considerable space in the record is occupied with testimony in relation thereto. It is contended by Winebrenner that it was done on the 27th instead of the 22nd as claimed by Smith. Several witnesses testify in support of each contention and the statements of some of them are so positive and flatly contradictory that it would be difficult to arrive at a satisfactory conclusion as to which is correct. I am, however, of the opinion that the point is only of minor impor-

tance in the case and that the merits of the controversy between Winebrenner and Smith are sufficiently manifest from other facts shown to obviate the necessity of deciding upon
20 the preponderance of evidence on the question as to what date Smith dug the hole in question. He states that on September 27th, or later he selected a house site, but did not attempt to make any improvements; that he bought some lumber about October 3rd with which to build a house; that he had the first load of lumber hauled about the 20th and the balance at the end of the month; that he did not commence to build a house until October 23rd, on account of the sickness of one of the children. He moved his family into the house November 28th, 1893, and has lived there ever since. He then had a frame house 16 x 18, a kitchen 12 x 16 and another addition. He states that at this time Winebrenner had "fenced him out" and that he took what he could get, and that he has six or seven acres fenced and under cultivation.

Winebrenner states that he went upon the land upon the day of the opening and intended to begin improvements upon the next day, but did not for the reason that a man named Minor had already made a settlement upon it; that as soon as he learned that Minor had abandoned his settlement he stuck a stake with his name and address upon it, located a house site and began digging a well, dug it about 24 inches wide and 15 or 20 inches deep that day. This occurred on September 22nd. On the 24th of the same month he erected a tent on the land, 10 x 12, in which he slept occasionally until his house was built. He had left his three children with relatives in W. Va., (his wife being dead) until he could provide him with a comfortable home on his claim. He worked out part of the time until about the first part of October. He began building a two-wire fence on about the third or fourth of October and finished it on the 9th. He has over 100 acres now inclosed. He began building his house on the 23rd of October and finished it in three or four days and at once fitted it up and moved into it. He has a hen-house and a well and about forty acres in cultivation. The value of his improvements *are* shown to be considerably in excess of those of Smith.

In view of the foregoing facts, I am of the opinion that the rights of Winebrenner are superior to those of Smith. Winebren-
21 ner swears that at the time he built his tent, on September 24th, he did not see any evidence of Smith's settlement. It is not shown that Smith's stake stuck on the 16th, was still standing, and even if it was it was not sufficient to charge Winebrenner with notice of Smith's claim, in the absence of the former's actual knowledge of its existence. . Besides Smith did not attempt to make any actual and permanent improvements until more than a month after he stuck his stake, and did not attempt to establish residence for nearly two and one-half months. On the other hand Wine- erected his tent within two days after his initial acts of settlement, and on the third night following began sleeping on the land.

For the reasons herein set forth your decision is reversed, Smith's

contest is dismissed, Forney's entry held for cancellation and the land held subject to Winebrenner's right of entry.

You will give due notice of this decision and of the right of appeal.

Respectfully, E. F. BEST,
Acting Commissioner.

EXHIBIT "B."

DEPARTMENT OF THE INTERIOR,
WASHINGTON, *January 18th*, 1897.

ROBERT L. WINEBRENNER and JOHN T. SMITH
vs.
EDWARD C. FORNEY.

The Commissioner of the General Land Office.

DEAR SIR: On September 23rd, 1893, Edward C. Forney
22 made homestead entry for the S. W. ¼ of sec. 19, tp. 26, N. R. 1 E. I. M., Perry, Oklahoma. On October 7th, 1893, Robert L. Winebrenner file- a contest against the entry of Forney, alleging that Forney was disqualified because he entered the race from the Ponca reservation. Winebrenner also claimed prior settlement on said land. On November 3rd, 1893, John T. Smith filed a contest alleging prior settlement and alleging that Forney was disqualified for the reason stated by Winebrenner.

The cases were consolidated and heard September 12th, 1894. On the day of the hearing Forney moved to strike from the contest affidavit the charge of disqualification, as it was insufficient upon which to order a hearing. The motion was sustained by the register on the authority of two letters of the Commissioner, dated respectively October 3rd, 1893, in the case of McMannus *vs.* Burns, and November 5th, 1894, in the case of Hartshorn *vs.* Young, which held that the law did not disqualify from entering from an Indian reservation.

On November 17th, 1894, the local office found that Forney was not disqualified by having entered the Territory from the Ponca reservation, and that neither Winebrenner nor Smith had made a valid settlement at the date of Forney's entry.

On July 6th, 1895, your office, speaking of Forney's disqualification, said:

"Your decision that Forney is a qualified entryman is in accordance with the ruling of this office in force at the time, That ruling has, however, been reversed by the Hon. Secretary, (Cagle *vs.* Mendenhall, 20 L. D. 46).

The testimony shows that Forney made the race from the Ponca reservation, and according to that decision he is therefore disqualified from acquiring title to said land, and your decision is reversed."

As between Smith and Winebrenner your office found that the latter had the superior rights. You then decreed that Forney's entry be held for cancellation and the land held subject to Winebrenner's right of entry. From this Forney and Smith both appealed.

On December 6th, 1896, the department overruled the decision in the case of Cagle *vs.* Mendenhall, (20 L. D. 46), upon which your office decision is based, by ruling that entering from an Indian reservation did not disqualify a person to make a homestead entry.

23 Brady *vs.* Williams, 23 L. D.

In view of this and the failure on the part of contestants by preponderance of evidence to show prior settlement, your office decision is reversed, and the entry of Forney will remain intact.

The papers in the case are therewith returned.

Very respectfully, DAVID R. FRANCIS, *Secretary.*

EXHIBIT "C."

DEPARTMENT OF THE INTERIOR,
WASHINGTON, *August 11th*, 1897.

ROBERT L. WINEBRENNER and JOHN T. SMITH
vs.
EDWARD C. FORNEY.

Motion for Review.

Commissioner of the General Land Office.

SIR: The department on January 18th, 1897, rendered a decision in the case of Robert L. Winebrenner and John T. Smith *vs.* Edward C. Forney involving the S. W. ¼ of sec. 19, T. 26 N. R. 1 E., Perry land district, O. T., reversing the decision of your office dated July 6th 1895, and holding that the defendant Forney was not disqualified from acquiring lands in Oklahoma by reason of having entered the Territory from the boundary of an adjacent Indian reservation. Winebrenner and Smith respectively have filed motions for review of said case. The allegations, (aggregating forty in number), accompanying said motion contend primarily that the departmental decision upon which the case at bar was ruled, (Brady *et al.* *vs.* Williams, 23 L. D. 533), was erroneous and ought to be overruled. Said case of Brady, *et al. vs.* Williams, was decided by the department on review, July 24th, 1897, and the doctrine

24 therein enunciated reaffirmed.

It is now alleged that there is a destinction between the Brady-Williams case and the case now under consideration inasmuch as in the former case "Brady entered from the one-hundred-foot strip and not from the reservation."

This allegation is answered by the original departmental decision in the Brady-Williams case, (23 L. D. 533), and answered directly by the same case on review, (25 L. D. —), which says: "It is argued that those entering from that side were transgressors because of having reached the strip through an Indian reservation; but the fact that one is a transgressor on an Indian reservation would not, of itself, disqualify him from making homestead entry. No such

result is disclosed in the statutes and none such is found in any law or treaty."

The allegation last above referred to is found in the motion filed by counsel for Smith. On the contrary counsel for Winebrenner alleges that Forney was disqualified, notwithstanding the departmental decision in the case of Brady, *et al.* vs. Williams, for the reason that at twelve o'clock noon central standard time, Sep. 16th, 1893, said Forney was upon and within the lands opened to settlement on said date, at a point immediately west of Ponca reservation.

Winebrenner's affidavit makes no such charge as above, but on the contrary alleges that said Forney, at twelve o'clock noon of September 16th, 1893, was in township 25, N. R. 1 E. of I. M., and entered the lands opened to settlement from the position in said T. 25, R. 1 E. I. M.

T. 25, N. R. 1 E. is in the Ponca Indian reservation. The contestant cannot, on motion for review, for the first time, set up a new charge—certainly not one inconsistent with the charge formerly made.

The remaining allegations in each of the motions for review relate to the question of priority of settlement regarding which nothing is offered that has not heretofore been presented to and considered by the department.

25 The motion and accompanying papers are herewith returned.

Very respectfully, THOS. RYAN,
Acting Secretary.

On the back of which said amended petition appears the following endorsement of filing:

Filed March 18, 1901, Jay E. Pickard, clerk, by E. A. Burke, deputy.

And be it further remembered that thereafter and on the 30th day of March, 1901 defendant filed his demurrer to said amended petition which said demurrer is in words and figures as follows, to wit:

In the District Court of Kay County, Oklahoma Territory.

ROBERT L. WINEBRENNER, Plaintiff,
vs.
EDWARD C. FORNEY, Defendant. } Demurrer.

26 Comes now the defendant, Edward C. Forney, in the above-entitled cause and demurs to the amended petition of the plaintiff therein and for grounds of demurrer states:

First. That the petition in this case does not contain a sufficient statement of facts to constitute a cause of action by the plaintiff against the defendant or to entitle the plaintiff to the relief prayed for.

Second. That the allegations of fact set forth in the petition are not sufficient to vest in this court sitting as a court of equity the power and authority to review the decision and determination of the Land Department upon the contest claims of plaintiff and defendant for the better right to make entry of the tract of land mentioned and described in the plaintiff's petition.

Third. Because the questions here sought to be litigated in plaintiff's petition are questions which the Congress of the United States has vested the jurisdiction in the Department of the Interior to hear and determine and upon which the action of the Interior Department is final and this court is not vested with power and authority upon any allegations set forth in plaintiff's petition to disturb, vacate or overturn the award of priority of right and better right to this defendant to make entry of said lands.

Fourth. Because the petition shows upon its face that a patent to the tract of land in controversy has not passed from the Government of the United States to this defendant and the petition does not show that the legal title to the land in controversy has ever passed from the Government of the United States and in this particular also fails to state facts sufficient to constitute a cause of action by plaintiff against this defendant.

DALE & BIERER,
Attorneys for Defendant.

On the back of which said demurrer appears the following file-marks:

27 "Filed March 30, 1901, Jay E. Pickard, clerk, by E. A. Burke, deputy."

Be it further remembered that, to wit, on the 5th day of April, this cause coming on for hearing upon the demurrer of said defendant to the amended petition of plaintiff, the court made and entered the following journal entry, in said cause:

In the District Court of Kay County, Territory of Oklahoma.

R. L. WINEBRENNER, Plaintiff,
vs.
EDWARD C. FORNEY, Defendant. } Journal Entry.

Now upon this 5th day of April, 1901, this cause comes on for hearing upon the demurrer of the defendant to the amended petition of the plaintiff; plaintiff appearing by S. H. Harris, his attorney, and the defendant appearing by A. G. C. Bierer, his attorney; defendant waives all question as to the sufficiency of the legal title of defendant in the land in question and submits his demurrer upon the question as to the rights of plaintiff in and to the land in question under the facts stated in his amended petition.

After hearing the argument of counsel for the respective parties the court takes said cause under advisement upon said demurrer and gives the parties permission to file written briefs; the defendant to file his brief with the court within twenty days from this date,

after serving a copy thereof — the attorney for plaintiff and the plaintiff to file his brief within twenty days after service upon him of the brief of defendant.

BAYARD T. HAINER, *Judge.*

O K.
S. H. HARRIS,
Attorney for Plaintiff.

28 On the back of which said journal entry appears the following endorsement of filing:
"Filed April 15, 1901. Jay E. Pickard, clerk."

Be it further remembered that this cause coming further on for hearing upon the demurrer of said defendant to the amended petition herein, on the 22nd day of June, 1901, the court made and executed the following journal entry, in words and figures as follows, to wit:

In the District Court of Kay County, Oklahoma Territory.

ROBERT L. WINEBRENNER, Plaintiff,
vs.
EDWARD C. FORNEY, Defendant. } Journal Entry.

Now on this 22nd day of June, 1901, this cause comes on for hearing, the plaintiff appearing by his attorney, S. H. Harris, and the defendants appearing by his attorneys, Dale & Bierer, upon the demurrer of the defendant to the amended petition filed in said cause.

The court having heard the argument on said demurrer and considered the brief of counsel thereon, and being duly advised in the premises doth sustain said demurrer to which the plaintiff excepts.

It is therefore, by the court considered, ordered and adjudged that the demurrer of the defendant to the amended petition of the plaintiff in this cause be and the same is hereby sustained on the grounds that the same does not state facts sufficient to constitute a cause of action against the defendant, to which ruling and judgment of the court the plaintiff excepts.

On application of counsel for plaintiff, plaintiff is allowed thirty days in which to again amend his petition. Defendant is given ten days to plead thereto.

BAYARD T. HAINER, *Judge.*

29 O K.
S. H. HARRIS,
Attorney for Plaintiff.

O K.
DALE & BIERER,
Attorneys for Defendant.

On the back of which said journal entry appears the following file-marks:
"Filed July, 18, 1901, Jay E. Pickard, clerk. By E. A. Burke, deputy.

Be it further remembered that to wit, on the 30th day of September, A. D. 1901, plaintiff filed his second amended petition in said cause, which said second amended petition is in words and figures as follows, to wit:

In the District Court of Kay County, Territory of Oklahoma.

ROBERT L. WINEBRENNER, Plaintiff,
vs.
ED. C. FORNEY, Defendant.
} Second Amended Petition.

Comes now the plaintiff above named by leave of court first had and obtained, and files this, his second amended petition, and for cause of action against said defendant alleges and says:

First, that he, the plaintiff is a native-born citizen of the United States of America; that on the 16th day of September, 1893, he was over twenty-one years of age and the head of a family; that prior to the opening to settlement of the country known as the Cherokee Outlet on September, 16th, 1893, this plaintiff had never entered upon, or occupied any portion of the lands embraced in said Outlet; that plaintiff was not then, and is not now the owner of one hundred and sixty acres of land in any State or Territory of the United States or anywhere else; that prior to the time of said opening, plaintiff procured a Booth certificate entitling him to enter a homestead in said Outlet, and at the time of opening said country to settlement, plaintiff was and all the time since has been qualified in all respects to take, hold occupy and acquire title to land in said Outlet under the homestead laws of the United States, and under the laws, rules, proclamation, and regulations relative to said country to settlement.

Plaintiff further says, that on the 16th day of September, 1893, at the hour of twelve o'clock, noon, central standard time, he entered upon said country for the purpose of locating and claiming a homestead as aforesaid, and immediately thereafter entered upon and occupied the southwest quarter of section 19, in township 26, north, range one, east of the Indian meridian in Kay county, Territory of Oklahoma, being a portion of the lands open to settlement as before stated; that shortly after entering said land, this plaintiff believing that said land had been lawfully occupied and claimed by some other person left the same, but returned thereto on the 22nd day of September, 1893, after being informed and satisfied that said land was not lawfully occupied and claimed under the laws of the United States; that on said 22nd day of September this plaintiff occupied said land as a homestead under the laws governing the holding and acquiring of title to said land, and has ever since held and claimed said land as a homestead, and has ever since occupied, improved and cultivated the said land in all respects in accordance with the requirement of the laws, rules and regulations of the United States and the Department of the Interior, and is now fully entitled to a patent therefor by virtue of such compliance with the laws of taking holding and acquiring said land as a homestead.

31 That immediately after said settlement and occupancy of said land and as a part of the work performed thereon by this plaintiff pursuant to the laws of the United States, this plaintiff fenced said claim, dug a well thereon, and put about sixty acres thereof in cultivation, built a residence thereon for himself and family wherein he has ever since resided.

Plaintiff further says, that on the 23rd day of September, 1893 the defendant disregarding the rights of this plaintiff as the first and legal settler upon and occupant of said land, made a homestead entry for said land at the United States land office at Perry, O. T. the said land being located within the district for which said land office was established; that shortly after making such homestead entry the defendant threw down a portion of the plaintiff's fence, and forcibly took possession of about seventy acres of said land and has ever since retained possession thereof unlawfully, forcibly and against the will and protest of this plaintiff.

Plaintiff further says, that within three months after making settlement upon said land as aforesaid, he filed a contest against said homestead entry of the defendant in the United States Land Office in which said contest affidavit this plaintiff alleged in substance, that he settled upon and occupied said land before the settlement or homestead entry of the defendant, and that the said defendant was not qualified to make homestead entry of, or settlement upon said land by reason that he, the said defendant, entered upon and occupied the lands embraced within the country known as the Cherokee Outlet prior to twelve o'clock noon, central standard time, of the 16th day of September, 1893, and subsequent to the act of Congress and proclamation of the President opening said lands to settlement and entry for homestead purposes, and that at the hour of opening said country to settlement, the said defendant was within the outer bound-ry of said country and within the inner bound-ry of one-hundred-foot strip surrounding the said outer bound-ry, and was then and there upon the western bound-ry of that part of said Outlet known as the Ponca reservation; that a hearing of said trial was ordered upon

32 said contest, and on the 12th day of November, 1894 said contest came on for trial and was tried before the register and receiver of said land office at Perry, O. T., and upon consideration of the evidence offered upon said trial, the said register and receiver rendered their decision in favor of said defendant and against this plaintiff; and upon said trial and hearing the said defendant admitted that he had entered upon the said Cherokee Outlet as herein stated; that the said register and receiver found such to be the fact from the evidence in said cause, but notwithstanding such admission and findings of fact, the said register and receiver misunderstanding and misapplying the laws with reference to the disqualifications of the defendant, erroneously and unlawfully found and determined that said defendant was not disqualified by reason of said fact to acquire title to said land under the homestead laws of the United States.

A true and exact copy of said decision and findings of fact of the

said register and receiver is hereto attached marked Exhibit "A," and made a part of this petition.

Plaintiff further says, that in due time and form he appealed from said erroneous and unlawful decision to the Hon. Commissioner of the General Land Office and thereafter and on the 6th day of July, 1895, the said Commissioner reversed the said decision of the local land office and found that this plaintiff was the first and legal settler upon said land, and that plaintiff was entitled to said land as a homestead by virtue of his qualifications and compliance with the laws of the United States; that the said Commissioner also found, and determined that the said defendant was within the outer bound-ry of said lands as hereinbefore set out, and that as a matter of law, he was thereby disqualified to acquire title to said land or to make a valid homestead entry thereon.

A true copy of said decision of the Commissioner of the General Land Office is hereto attached marked Exhibit "B" and made a part of this petition.

Plaintiff further says that the said defendant thereafter appealed from said decision to the Hon. Secretary of the Interior, that
33 upon consideration of said cause upon said appeal, the said Secretary approved the findings of fact that the said defendant had entered upon the said Outlet as herein set out, but the said Secretary then and there misunderstood and misapplied the law in relation to the qualification of said defendant to take and hold said land, and that on the 27th day of January, 1897, the said Secretary erroneously and unlawfully held, decided and determined that the said defendant was not disqualified to acquire said land under the homestead laws of the United States on account of the facts as aforesaid, and also found and determined that the said defendant settled upon and improved said land before the settlement and improvement of this plaintiff.

A true and exact copy of the said decision is hereto attached marked Exhibit "C" and made a part of this petition.

Plaintiff further says, that in due time and form, he filed a motion for a review of said decision of the Secretary of the Interior urging a reconsideration of said erroneous and unlawful decision, and afterwards and on the 11th day of August, 1897, the said Secretary rendered his decision upon said motion, and in said decision again erroneously and unlawfully held, found and determined that the facts herein set out, and as found by the various departments of the Land Office of the United States in reference to the entry of the defendant upon the land in question, did not disqualify the said defendant to take hold and acquire title to said land under the laws of the United States.

A true and exact copy of the decision is hereto attached and marked Exhibit "D" and made a part of this petition. That in all said decisions, findings and determinations, it was found and adjudged that this plaintiff was in all respects qualified to take, hold and acquire title to said land, and that plaintiff was entitled to said land as a homestead, but for the prior and superior rights of said defendant, and but for said unlawful and erroneous conclusions and

misapplications of law, said land would have been awarded to this plaintiff.

Plaintiff further says, that on the 31st day of July, A. D. 1900, said defendant made his final proof of residence upon and
34 cultivation of said land, and notwithstanding the disqualifications of said defendant aforesaid, said final proof was unlawfully and erroneously approved and final or duplicate receipt, #960 issued to the said defendant for said land, and this plaintiff forcibly, unlawfully and wrongfully deprived of said land and his rights, and interests therein.

Plaintiff further says, that afterwards and on the 1st day of October, 1900, the Government of the United States by and through its President, the Hon. William McKinley, executed and delivered to said defendant its patent for said land. A true and exact copy of said patent is hereto attached and marked Exhibit "E" and made a part of this petition.

Plaintiff further says, that the said defendant has paid out and expended in procuring the said final receipt and patent, the following items and amounts:

Costs final proof	$5.25
Costs publication of notice	4.00
Costs of filing homestead entry	14.00

That plaintiff now tenders to the said defendant all of the aforesaid sums and brings the same into the court and offers to deposit the same in the court, or where directed by the court, and offers to pay into the court, or according to its orders and directions any other sum or sums expended by the said defendant for which the plaintiff should make payment, or which may be found by the court to be due from this plaintiff to the said defendant.

Wherefore, plaintiff prays judgment against the said defendant declaring the said title so unlawfully issued to him by the Government of the United States to be illegal and void as to the said defendant, and to be held in trust for the use and benefit of this plaintiff, and that defendant be required to execute a proper and legal conveyance of said land to this plaintiff, and in the event of failure or refusal to execute said conveyance, that a decree of this court be granted in lieu thereof, for the costs of this action and a proper relief.

S. H. HARRIS,
Attorney for Plaintiff.

35 EXHIBIT "A."

Before the United States Land Office at Perry, O. T.

ROBERT L. WINEBRENNER, JOHN T. Smith
vs.
EDWARD C. FORNEY.
} Involving S. W. ¼ Section 19, Township 26 North, of Range 1 East, I. M.

Decision of Register and Receiver.

The register being present during the taking of testimony.

The defendant E. C. Forney, made homestead entry on the 23rd of September, 1893.

The contestant Robert L. Winebrenner filed affidavit of contest, among other things, charging that he was the first settler on said land, and that said settlement was prior to the entry of said Forney.

(Smith)*

John T. Forney A filed his affidavit of contest, claiming and alleging, among other things, that he was the first settler, and that said settlement was prior to any settlement made by Winebrenner of the defendant; and prior to the entry on said land.

While the record in this case, we think, is unnecessarily voluminous, and the testimony, on many minor points, contradictory and irreconcilable, yet, to our minds, the issues are simple enough, and the evidence, taken as a whole, sufficiently clear to enable us to render our decision with little or no difficulty.

The one question which elicited more testimony than any other in this case, was which of the two contestants was the first to settle upon the land. Smith claims to have reached the land on the 16th of September, 1893, and that he then and there laid claim to the same, and while there staked the same with a stake about eighteen inches high. He found other evidence of ini-atory acts of settlement which had Forney's name on them, and which he subsequently learned were made by Forney, prior to the time he reached the land; and that he laid claim to the land because he thought
36 the party who made them must necessarily be disqualified. (See his testimony.)

We are of the opinion that, even though Forney had been disqualified, the mere entry on the land on the 16th, and the sticking of a stake eighteen inches high, such as he describes in his testimony, were not sufficient acts of settlement, as would confer on him any rights. The idea that a state such as he mentioned in his testimony would be of any avail to him in segregating the land from the public domain, in our minds, is absurd; or that he could follow such an act up in the face of the adverse rights of other parties, we think would violate every principle of law and justice, and open the floodgates for frauds and perjuries of every conceivable kind,

[* In pencil in copy.]

in these contest cases. The only kind of initial acts that would avail one in these contests must be so open, conspicuous, and notorious as would put any ordinary prudent man on notice that some one was claiming that particular piece of land, and be so closely connected with residence as to leave no doubt of the good faith of the party who made them. To accept any other rule begets doubts, and uncertainties and confusions. We have said this much on this particular point in this case, so that the public and the parties to the hundreds of contest cases in this office may, in the conduct of these cases, know and understand that in the disposal of these cases we will adhere to these plain common-sense rules in determining the rights of the parties, and to the end that when understood it will save an enormous amount of money, now expended for masses of irrelevant testimony.

Therefore, this stake eighteen inches high could not save one hundred and sixty acres of land from appropriation by the first comer who took possession, and began improving the same, in a permanent manner, and in such a way as would be reasonably expected of a man who expected to make it his home, especially so when he had no notice of the first party's claim; contestant Smith claims to have made no other improvements, or done any other acts indicative of intention to settle upon the land, until the 22nd day of September. On this day he claims to have returned to the land and dug a hole about eighteen inches deep, and between three and four feet in diameter. This is all he claims to have
37 done on the land prior to the time he sent his lumber down there by his son for the purpose of building his house which was on the 4th or 5th of October. He claims to have been on the land on the 25th of September, with his son, for the purpose of selecting a site for his house, but did nothing on that day. The only thing up to the 4th or 5th of October that smacked of initial acts of settlement was the eighteen-inch elm stick stuck on the 16th of September, and the hole dug on the 22nd of the same month, and this is giving him credit for all he claims.

We admit that the locality and its accessibility to the outside world, the circumstances of the party, the general condition of the country, and the seasons would have something to do in determining the reasonableness or unreasonableness of the time in which some substantial acts should be done by a party claiming to have settled upon and segregated the land, to date from some previous initial act. But in this case, when this country was overrun with thousands of homeseekers, five or six days elapsed between the sticking of the first little stick, and the digging of the hole on the 22nd of September. Mr. Smith lived at Arkansas City, not more than twenty or twenty-five miles from the land. Between the digging of the hole on the 22nd and his return to the land on the 27th five more days elapsed, and still on this day nothing was done on the land. Such is the case up to the 5th of October, as Smith makes it, at which time he seems to have been in earnest for the first time in appropriating the land.

But all of the foregoing is contested every step, and a great amount

of the testimony in the record goes to the proving or disproving of these acts at the time claimed; just when the hole was dug by Smith we cannot undertake to say, nor do we think it necessary, for we are of the opinion that Smith's settlement began at the time when he hauled his first load of lumber, and that while it is true he had his eye on this land up to this time, he never undertook to seize upon it until he was convinced that the defendant was disqualified by reason of entering from the Ponca reservation. He himself
38 so admits, and then, and not until then, did he manifest his intention by his acts.

What has been said in regard to Smith may, in many instances be applied, to the case as made by Winebrenner.

He claimed nothing before the 22nd of September. And here, again, we find a party on the 22nd (who was on the land on the 16th of September) digging a hole, which is termed a well, twenty inches deep and twenty-four inches across. This little hole, at this late date, is seriously contended to have virtue and potency enough to spread its influence over one hundred and sixty acres of land, and segregate the same from the public domain. We think there is no saving grace in a hole dug at this late, for certainly there can be no reason why a more visible, valuable and permanent improvement could not have been made by which honest settlers would not be ensnared into lawsuits.

While it is not contended that this little hole was not dug, and afterwards plowed over by Forney, yet we can see no good reason for giving him any credit for the same. Evidently he was in the same frame of mind regarding the prior claims to this land by some one else as was Smith. While Smith feared Forney, Winebrenner feared Minor and Forney.

On the 25th he put a tent on the land; at least the tent was on the land when Smith came down on the 27th, for he saw it. Now it will not be contended but that a tent ten by twelve is infinitely superior in every respect, for the purpose of notifying the world that a person who places it on a quarter section of land intends to make some claim to the land, than sticks and small holes stuck and dug in and upon some nook or corner of the prairie or timber, which is not apparent to ordinary observers.

We would therefore, date Winebrenner's settlement from the 25th of September, the date of placing the tent on the land. As to the other subsequent improvements of Winebrenner and Smith, see their statements in regard thereto, the value of which alone is disputed.

Forney offers no evidence in this case, except that which he obtains by cross-examination of the witnesses of both contest-
39 ants. And this testimony goes to establish the fact that Forney ran from a point along the Ponca Indian reservation, and reached the land at about 12.24 p. m.; and that he only had to go two and a half miles to reach the land from where he started.

The evidence tends to show that certain holes, stakes and a tree set out on the 16th, *was* put there by Forney (see testimony of Smith, Hamilton, and Shup, as well as other witnesses in the case). But

Mr. Forney did not claim the same by his own testimony, and chose to rest upon his entry. And we think he chose well, for following the rule laid down in McManus *vs.* Sam. J. Burns, G. L. O. letters Oct. 23, 1891, he was a qualified entryman, and being such he got his entry of record on the 23rd of September, 1893, which was prior to any acts of settlement made by either of the contestants.

We think that the contestants have each failed to make out a case; and therefore we find in favor of defendant, and recommend the confirmation of his entry.

Thirty days for appeal.

LOUIS DAVIS, *Register.*
J. H. KING, *Receiver.*

We hereby accept service of the foregoing decision and acknowledge receipt of a true copy of the same this 17 day of Nov. 1894.

MORRIS & JOHNSON,
Att'ys for Smith.
MORGAN & PANCOAST,
Att'ys for Winebrenner.

EXHIBIT B.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *July 6th*, 1895.

40 ROBERT L. WINEBRENNER and John T. Smith *vs.* EDWARD C. FORNEY. } Involving H. E. No. 628, made Sep. 23rd, 1893, for the S. W. ¼ Sec. 19, Town 26 N., R. 1 E., I. M.

Register and receiver, Perry, O. *Y.*

GENTLEMEN: On September 23rd, 1893, Edward C. Forney made H. E. No. 628 for the S. W. ¼ sec. 19, town 26, N. R. 1 E. I. M.

On October 1st, 1893, Robert L. Winebrenner filed an affidavit of contest against said entry alleging that Forbey is disqualified by reason of having entered "the race" from the Ponca Indian reservation; also, that he, (Winebrenner), on September 22nd, 1893, "went upon said tract of land with the intention of claiming the same as a homestead under the homestead laws and that he established his residence thereon at five o'clock of said day, and that he made certain improvements thereon to wit, a certain well and erected his tent thereon, and that he has ever since said time so continued to occupy the same and reside thereon, and that his right to said tract are superior and prior to the rights of all other parties."

On Nov. 3rd, 1893, John T. Smith filed an affidavit of contest against said entry, alleging that he made a *bona fide* settlement upon the land in controversy, prior to the entry and settlement of Forney, and that Forney made the race from the Ponca Indian reservation.

On Dec. 9th, 1893, Thos. E. Barr filed an affidavit of contest al-

leging settlement on the day of the opening and that his was the first legal settlement on the land.

These cases were consolidated and set for trial May 18th, 1894. On this date the parties all appeared and by agreement a continuance to September 3rd, 1894, was ordered. The case finally went to trial Nov. 12th, 1894. The contestant Barr failed to appear
41 and his contest was dismissed. The testimony shows that he sold his improvements to Winebrenner in April, 1894, for $250.00.

On November 17th, 1894, you rendered a decision in favor of Forney, holding, in substance, that he is not disqualified by reason of having entered the race from the Ponca reservation and that neither Winebrenner or Smith had made a valid settlement at the date of Forney's entry. Winebrenner and Smith both appealed from that decision. Forney also appeals from some of your findings of fact which he deems prejudicial to his case.

Your decision that Forney was a qualified entryman was in accordance with the ruling of this office in force at the time. That ruling, has, however, been reversed by the honorable Secretary (Cagle *vs.* Mendenhall, 20 L. D. 446).

The testimony shows that Forney made the race from the Ponca reservation, and according to said decision, he is therefore disqualified from acquiring title to said land and your decision is reversed.

There remains to be determined the question of priority as between Winebrenner and Smith.

The testimony on this point is rather voluminous and much of it irrelevant and contradictory. They were both in the race on the day of the opening. Smith admits that Forney reached the land first (at 12.25), but he states that when he arrived, (about two o'clock), he saw Forney's stake with the time of arrival written on it, he concluded that he, (Forney) must have made the race from one of the reservations on the east, and was therefore an illegal settler, and he therefore claimed the land himself and stuck a stake about 18 inches high and wrote his name on an empty tomato can and put it on the top of the stake. He did nothing else that time but returned immediately to his home in Arkansas City. He states that on the 22nd day of September he returned to the land and dug a hole about three feet in diameter and 18 inches deep and stuck another stake. The question as to the date of the digging of this hole appears to have been regarded by the parties as of great importance, and consid-
42 erable space in the record is occupied with testimony which relates thereto. It is contended by Winebrenner that it was done on the 27th instead of the 22nd as claimed by Smith. Several witnesses testify in support of each contention and the statements of some of them are so positive and flatly contradictory that it would be difficult to arrive at a satisfactory conclusion as to which is correct. I am, however, of the opinion that the point is only of minor importance in the case and that the merits of the controversy between Winebrenner and Smith are sufficiently manifest from other facts shown to obviate *that* the necessity of deciding upon the preponderance of evidence on the question as to what date Smith dug

the hole in question. He states that on September 27th, or later he selected a house site, but did not attempt to make any improvements; that he bought some lumber about October 3rd with which to build a house; that he had the first load of lumber hauled about the 20th and the balance at the end of the month; that he did not commence to build a house until October 23rd, on account of the sickness of one of the children. He moved his family into the house November 28th, 1893, and has lived there ever since. He then had a frame house 16 x 18, a kitchen 12 x 16 and another addition. He states that at this time Winebrenner had "fenced him out" and that he took what he could get, and that he has six or seven acres fenced and under cultivation.

Winebrenner states that he went upon the land the day of the opening and intended to begin improvements upon the next day, but did not for the reason that a man named Minor had already made a settlement upon it; but as soon as he learned that Minor had abandoned his settlement he stuck a stake with his name and address upon it, located a house site, and began digging a well, dug it about 24 inches wide and 15 or 20 inches deep that day. This occurred on September 22nd. On the 24th of the same month he erected a tent on the land, 10 x 12, in which he slept occasionally until his house was built. He had left his three children with relative- in W. Va., (his wife being dead) until he could provide him with a comfortable home on his claim. He worked out part
43 of the time until about the first part of October. He began building a two-wire fence on about the third or fourth of October and finished it on the 9th. He has over 100 acres now enclosed. He began building his house on the 23rd of October and finished it in three or four days and at once fitted it up and moved into it. He has a hen-house, a well and about forty acres in cultivation. The value of his improvements *are* shown to be considerably in excess of those of Smith.

In view of the foregoing facts I am of the opinion that the rights of Winebrenner are superior to those of Smith. Winebrenner swears that at the time he built his tent, on September 24th, he did not see any evidence of Smith's settlement. It is not shown that Smith's stake stuck on the 16th, was still standing, and even if it was it was not sufficient to charge Winebrenner with notice of Smith's claim, in the absence of the former's actual knowledge of its existence. Besides Smith did not attempt to make any actual and permanent improvements until more than a month after he stuck his stake, and did not attempt to establish residence for nearly two and one-half months. On the other hand Winebrenner erected his tent within two days after his initial acts of settlement, and that on the third night following began sleeping on the land.

For the reasons herein set forth your decision is reversed, Smith's contest is dismissed, Forney's entry held for cancellation and the land held subject to Winebrenner's right of entry.

You will give due notice of this decision and of the right of appeal.

Respectfully,

E. F. BEST,
Acting Commissioner.

44 EXHIBIT "C."

DEPARTMENT OF THE INTERIOR,
WASHINGTON, *January 18th*, 1897.

ROBERT L. WINEBRENNER and JOHN T. SMITH
vs.
EDWARD C. FORNEY.

The Commissioner of the General Land Office.

DEAR SIR: On September 23rd, 1893, Edward C. Forney made homestead entry for the S. W. ¼ of sec. 19, tp. 26, N. R. 1 E., I. M. Perry, Oklahoma. On October 7th, 1893, Robert L. Winebrenner filed a contest against the entry of Forney, alleging that Forney was disqualified because he entered the race from the Ponca reservation. Winebrenner also claimed prior settlement on said land. On November 3rd, 1893, John T. Smith also filed a contest alleging prior settlement and alleging that Forney was disqualified for the reason stated by Winebrenner.

The cases were consolidated and heard September 12th, 1894. On the day of the hearing Forney moved to strike from the contest affidavit the charge of disqualification, as it was insufficient upon which to order a hearing. The motion was sustained by the register on the authority of two letters of the Commissioner dated respectively October 3rd, 1893, in the case of McManus *vs.* Burns, and and November 5th, 1894, in the case of Hartshorn *vs.* Young, which held that the law did not disqualify from entering from an Indian reservation.

On November 17th, 1894, the local office found that Forney was not disqualified by having entered the Territory from the Ponca reservation, and that neither Winebrenner nor Smith had made a valid settlement at the date of Forney's entry.

On July 6th, 1895, your office, speaking of Forney's disqualification said:

45 "Your decision that Forney is a qualified entryman is in accordance with the ruling of this office in force at the time. That ruling has, however, been reversed by the Hon. Secretary, (Cagle *vs.* Mendenhall, 20 L. D. 46.)

"The testimony shows that Forney made the race from the Ponca reservation, and according to that decision, he is therefore disqualified from acquiring title to said land, and you- decision is reversed."

As between Smith and Winebrenner your office found that the latter had the superior rights. You then decreed that Forney's entry be held for cancellation and the land held subject to Winebrenner's right of entry. From this Forney and Smith both appealed.

On December, 6th, 1896, the department overruled the decision in the case of Cagle *vs.* Mendenhall, (20 L. D. 46), upon which your office decision is based, by ruling that entering from and Indian reservation did not disqualify a person to make a homestead entry.

Brady *vs.* Williams, 23 L. D.

In view of this and the failure on the part of contestants by preponderance of evidence to show prior settlement, your office decision is reversed, and the entry of Forney will remain intact.

The papers in the case are herewith returned.

Very respectfully, DAVID R. FRANCIS, *Secretary.*

EXHIBIT "D."

DEPARTMENT OF THE INTERIOR,
WASHINGTON, *August 11th*, 1897.

ROBERT L. WINEBRENNER and JOHN T. SMITH
vs.
EDWARD C. FORNEY.

Motion for review.

Commissiener of the General Land Office.

SIR: The department on January 18th, 1897, rendered a decision in the case of Robert L. Winebrenner and John T. Smith *vs.* Edward C. Forney, involving the S. W. ¼ of sec. 19, T. 26, N. R. 1 E.,
46 Perry, land district, O. T., reversing the decision of your office dated July 6th, 1895, and holding that the defendant Forney was not disqualified from acquiring lands in Oklahoma by reason of having entered the Territory from the boundary of an adjacent Indian reservation. Winebrenner and Smith respectively have filed motions for review of said case. The allegations, (aggregating forty in number), accompanying said motion conte-d primarly that the departmental decision upon which the case at bar was ruled (Brady, *et al. vs.* Williams, 23, L. D. 533), was erroneous and ought to be overruled. Said case of Brady, *et al. vs.* Williams was decided by the department on review, July 24th, 1897, and the doctrine therein enunciated reaffirmed.

It is now alleged that there is a distinction between the Brady-Williams case and the case now under consideration inasmuch as in the former case "Brady entered from the one-hundred-foot strip and not from the reservation."

This allegation is answered by the original departmental decision in the Brady-Williams case, (23 L. D. 533), and answered directly by the same case on review, (25 L. D.), which says: "It is argued that those entering from that side were transgressors because of having reached the strip through an Indian reservation; but the fact that one is a transgressor on an Indian reservation would not, of itself, disqualify him from making homestead entry. No such result is disclosed in the statutes and none such is found in any law or treaty."

The allegation last above referred to is found in the motion filed by counsel for Smith. On the contrary counsel for Winebrenner alleges that Forney was disqualified, notwithstanding the departmental decision in the case of Brady, *et al. vs.* Williams, for the reason that at 12 o'clock noon central standard time Sept. 16th, 1893, said

Forney was upon and within the lands opened to settlement on said date, at a point immediately west of Ponca reservation.

Winebrenner's affidavit makes no such charge as above, but on the contrary alleges that said Forney, at 12 o'clock noon of Sep-
47 tember 16th, 1893, was in township 25, N. R. 1 E. of I. M. and entered the lands opened to settlement from the position in said T. 25 R. 1 E. I. M.

T. 25, N. R. 1 E. is in the Ponca Indian reservation. The contestant cannot, on motion for review, for the first time, set up a new charge—certainly not one inconsistent with the charge formerly made.

The remaining allegations in each of the motions for review relates to the question of priority of settlement regarding which nothing is offered that has not heretofore been presented to and considered by the department.

The motion and accompanying papers are herewith returned.

Very respectfully, THOS. RYAN
Acting Sec'ty.

EXHIBIT "E."

The United States of America, to all to whom these presents shall come, Greeting:

Homestead certificate No. 960; application —.

Whereas, there has been deposited in the General Land Office of the United States a certificate of the register of the land office at Perry, O. T., whereby it appears that pursuant to the act of Congress approved May 20th, 1862, "To secure homesteads to actual settlers on the public domain," and the acts supplemental thereto, the claim of Ed. C. Forney has been established and duly consum-ated, in conformity to law, for the southwest quarter of section nineteen, in township twenty-six, north, range one, east of the Indian meridian in Kay county, Territory of Oklahoma, containing one hundred and sixty acres, according to the official plat of the survey of said land returned to the General Land Office unto the said Ed. C. Forney.

Now know ye, that there is, therefore, granted by the United States unto the said Edward C. Forney *to* tract of land above
48 described; to have and to hold the said tract of land, with the appurtenances thereof, unto the said Edward C. Forney, and to his heirs and assigns forever.

In testimony whereof, I, William McKinley, President of the United States of America *has* caused these letters to be made patent, and the seal of the General Land Office to be hereunto affixed.

Given under my hand at the city of Washington the first day of October, A. D. 1900, and of the Independence of the United States the one hundred and twenty-fourth.

By the President,

WILLIAM McKINLEY.
By F. M. McKEAN, *Secretary,*
By C. W. BENSH,
Recorder of the General Land Office.

On the back of which said second amended petition appears the following file-marks:
"Filed Sept. 30, 1901, Jay E. Pickard, clerk."

Be it further remembered that to wit, on the 30th day of September, 1901, the defendant herein filed his demurrer to the second amended petition of plaintiff, which said demurrer is in words and figures as follows, to wit:

In the District Court of Kay County, Oklahoma Territory.

ROBERT L. WINEBRENNER, Plaintiff,
vs.
EDWARD C. FORNEY, Defendant. } Demurrer.

Comes now the defendant, Edward C. Forney, in the above-entitled cause and demurs to the second amended petition of the plaintiff therein and for grounds of demurrer states:

First. That the second amended petition in this case does not contain a sufficient statement of facts to constitute a cause of
49 action by the plaintiff against the defendant or to entitle the plaintiff to relief prayed for.

Second. That the allegations of facts set forth in the petition are not sufficient to vest in this court sitting as a court of equity the power and authority to review the decision and determination of the Land Department upon the contest claims of plaintiff and defendant for the better right to make entry of the tract of land mentioned and described in the plaintiff's petition.

Third. Because the questions here sought to be litigated in plaintiff's petition are questions which Congress of the United States has vested the jurisdiction in the Department of the Interior to hear and determine and upon which the action of the Interior Department is final and this court is not vested with power and authority upon any allegations set forth in plaintiff's petition to disturb, vacate or overturn the award of priority of right and better right to this defendant to make entry of said lands.

DALE & BIERER,
Attorneys for Defendants.

On the back of which said demurrer to said second amended petition is endorsed the following marks of filing:
"Filed Sept. 30, 1901, .Jay E. Pickard, clerk."

Be it further remember-, that, to wit, on the 7th day of October, A. D. 1901, this cause coming on for hearing upon the demurrer of defendant to the second amended petition of plaintiff, and the court having heard the arguments of counsel, and being fully advised in the premises, m- le the following journal entry of judgment, which is in words and figures as follows, to wit:

In the District Court of Kay County, Oklahoma Territory.

50 ROBERT L. WINEBRENNER, Plaintiff,
vs.
EDWARD C. FORNEY, Defendant. } # 1645. Journal Entry.

And now upon this 7th day of October, A. D. 1901, the same being one of the regular judicial days of the September, 1901, term of the above-entitled court this cause comes on for hearing upon the demurrer of the defendant to the second amended petition of the plaintiff; the plaintiff appeared by S. H. Harris, his attorney, and the defendant appearing by J. F. King, and A. C. G. Bierer, his attorneys; and upon consideration of said demurrer and being advised in the premises the said demurrer is by the court sustained, to which ruling of the court plaintiff excepts.

Whereupon the plaintiff declines to ask permission to further plead and elects to stand upon his second amended petition.

It is therefore by the court considered, ordered and adjudged that plaintiff's action be and the same is hereby dismissed and that the defendant recover of the said plaintiff all costs taxed herein in the sum of — dollars, to all of which the said plaintiff excepts.

At plaintiff's request the time for making and serving the case-made herein is extended thirty days; the defendant given five days thereafter to suggest amendments; the said case-made to be settled upon three days' notice in writing by either party to the other of the time and place of said settlement. Execution for costs herein is stayed for the period of thirty days and if the said plaintiff gives a good and sufficient supersedeas bond within said thirty days, then execution herein is stayed until final judgment in this cause, pursuant to the determination thereof upon proceedings in error in the Supreme Court.

BAYARD T. HAINER, *Judge.*

O. K.

——— ———,
Attorney for Plaintiff.

O. K.

——— ———,
Attorney for Defendant.

51 On the back of which said journal entry appears the following endorsement of filing:

"Filed for record this 7th day of October, 1901. Jay E. Pickard, clerk, by E. A. Burke, deputy."

The foregoing contains a true and correct statement of all the pleadings, motions, orders, evidence, findings and proceedings upon which judgment was rendered.

S. H. HARRIS,
Att'y for Pl'tf.

Filed Dec. 6, 1901.

BENJ. F. HEGLER,
Clerk Supreme Court,
By JESSIE PARDOE, *Deputy.*

We, the undersigned, attorneys for the defendant in the foregoing suit, certify that the foregoing case-made was duly served on us this 25th day of October, 1901.

DALE & BIERER,
Attorneys for Defendant.

Filed Dec. 6, 1901,

BENJ. F. HEGLER,
Clerk Supreme Court,
By JESSIE PARDOE, *Deputy.*

We, the undersigned attorneys for Edward C. Forney, defendant in the above-entitled cause, hereby waive time for submitting amendments thereto, as well as notice of time and place of settlement, of said case-made, and agree that the same may be settled,
52 signed, and certified by the judge who presided at the trial in the district court at any time or place.

Dated at Guthrie, O. T. this 31st day of October, A. D. 1901.

DALE & BIERER,
Attorneys for Defendant.

Filed Dec. 6, 1901.

BENJ. F. HEGLER,
Clerk Supreme Court,
By JESSIE PARDOE, *Deputy.*

TERRITORY OF OKLAHOMA, } ss:
County of Kay, }

This is to certify, that the foregoing above case-made has been duly served in due time, and the same duly submitted to me for settlement and signing, as required by law, by the parties to said cause; that the same as above set forth, and as corrected by me, is true and correct and contains a true and correct statement of all the pleadings, motions, orders, evidence, findings, proceedings and judgments had in such case; and I hereby settle, allow, certify, and sign the same as true and correct, and hereby order that the clerk of the district court attest the same with the name and seal of said court, and file the same of record as provided by law.

Witness my hand, at Tecumseh, O. T. the 22nd day of November, 1901.

[SEAL.] BAYARD T. HAINER,
Judge of the District Court of Kay County, Oklahoma Territory, and the Judge Who Tried said Cause.

Attest:

JAY E. PICKARD, *Clerk,*
53 By E. A. BURKE, *Deputy.*

Filed Dec. 6, 1901.

BENJ. F. HEGLER,
Clerk Supreme Court,
By JESSIE PARDOE, *Deputy.*

TERRITORY OF OKLAHOMA, } ss:
Noble County, }

S. H. Harris, being first duly sworn on his oath states that legal and proper cost of the foregoing case-made is $18.00, which amount has been paid by plaintiff in error.

S. H. HARRIS.

Subscribed and sworn to before me this 5th day of December, A. D. 1901.

[SEAL.] ROBERT E. EVANS,
Notary Public.

My commission expires Oct. 5, 1905.

Filed Dec. 6, 1901.

BENJ. F. HEGLER,
Clerk Supreme Court,
By JESSIE PARDOE, *Deputy.*

54 [Endorsed:] 1169. Winebrenner *vs.* Forney. Petition in error and case-made. Filed in the office of the district court of Kay county, Oklahoma Territory this 25th day of November, 1901. Jay E. Pickard, clerk, by E. A. Burke, deputy. Filed Dec. 6, 1901. Benj. F. Hegler, clerk supreme court, by Jessie Pardoe, deputy.

55 And thereafter, at the January, 1902, term of said supreme court, on the fourteenth day of January, 1902, the following proceeding was had in said cause to wit:

ROBERT L. WINEBRENNER, Plaintiff in Error,
vs.
EDWARD C. FORNEY, Defendant in Error. } #1169.

Come now S. H. Harris, attorney for plaintiff in error, and A. G. C. Bierer, attorney for defendant in error, and waive oral argument in this cause; and the same is submitted on record and briefs — both parties.

56 And thereafter at the June, 1902, term of said supreme court, on the sixteenth day of June, 1902, the following proceeding was had in said cause, to wit:

ROBERT L. WINEBRENNER, Plaintiff in Error,
vs.
EDWARD C. FORNEY, Defendant in Error. } #1169.

And now this cause comes on for final consideration and determination by the court upon the record and briefs submitted therein.

And the court having duly considered the same, and being fully advised in the premises, finds: That the judgment of the lower court in this cause should be affirmed, at the cost of plaintiff in error.

It is therefore ordered and adjudged by the court, that the judgment of the lower court in this cause be and the same is hereby affirmed, at the cost of plaintiff in error.

Opinion by Burwell, J., Burford, C. J., and Gillette and Beauchamp, JJ., concurring; Hainer, J., who tried the cause below, and Pancoast, J., who was of counsel, not sitting; Irwin, J., absent.

And said opinion in said cause reads in words and figures as follows, to wit:

57 In the Supreme Court of the Territory of Oklahoma, June Term, 1902.

Filed July 16, 1902.

ROBERT L. WINEBRENNER, Plaintiff in Error,
vs.
EDWARD C. FORNEY, Defendant in Error. } No. 1169.

Syllabus.

Public lands—Who not disqualified to enter.—One who was within the Ponca Indian reservation before the hour of 12 o'clock noon (central standard time) of September 16th, 1893, and made the race from said reservation into that part of the Cherokee Outlet which was opened to settlement on that day, is not by reason thereof, disqualified from settling upon and filing a homestead entry upon a quarter section of land within the country then declared open to settlement.

Appeal from the district court of Kay county. Bayard T. Hainer, trial judge. Affirmed.

S. H. Harris, for appellant.
Dale & Bierer, for appellee.

Opinion of the court by BURWELL, *J.*:

This case involves the question as to whether one who made the race into the Cherokee Outlet, on September 16th, 1893, from the west line of the Ponca Indian reservation is a "sooner," and therefore disqualified to make homestead entry of any of the lands thrown open to settlement by the President's proclamation dated August 19th, 1893. Edward C. Forney made the run into the Cherokee Outlet on the day of the opening and made homestead entry on the land in controversy, which is the southwest quarter of section nineteen, of township twenty-six north, of range one east of the Indian meridian, in Kay county.

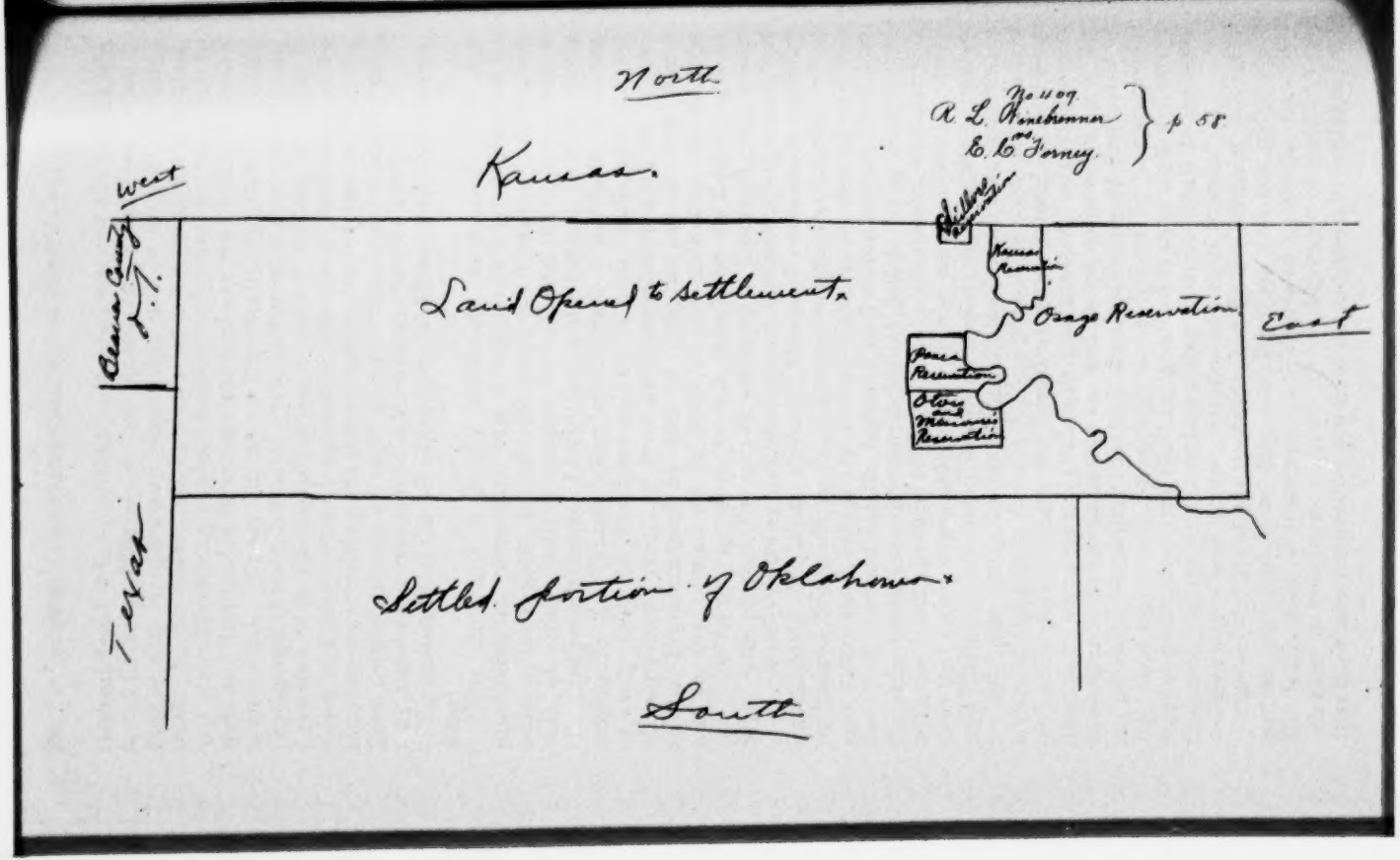
Robert L. Winebrenner filed a contest against Forney on the grounds of prior settlement and "soonerism." The contest was tried in the local land office, then appealed to the Commissioner of the

General Land Office and then to the Secretary of the Interior, who found in favor of Forney on both questions. Patent was issued to Forney and Winebrenner began this suit to declare a resulting trust. In the district court a demurrer to the petition was sustained, and plaintiff refusing to plead further, judgment for defendant for costs and dismissal of the action was rendered, and plaintiff appealed to this court. We are inclined to the opinion that this case might be disposed of upon technical grounds but as counsel on both sides have seen fit to waive every question except the one of disqualification of Forney, we will, because of the many other cases in the lower courts involving the same question, decide that point so that these parties, as well as other persons interested in similar cases, may know their respective rights without further delay.

By section 14 of the act of Congress of March 2nd, 1889, it is provided:

"The President is hereby authorized to appoint three commissioners, not more than two of whom shall be members of the same political party, to negotiate with the Cherokee Indians and with all other Indians owning or claiming lands lying west of the ninety-sixth degree of longitude in the Indian Territory for the cession to the United States of all their title, claim, or interest of every kind or character in and to said lands, and any and all agreements resulting from such negotiation shall be reported to the President and by him to Congress at its next session and to the counsel or counsels of the nation or nations, tribe or tribes, agreeing to the same for ratification, and for
57½ this purpose the sum of twenty-five thousand dollars, or as much thereof as may be necessary, is hereby appropriated, to be immediately available: Provided, that said commission is further authorized to submit to the Cherokee nation the proposition that said nation shall cede to the United States in the manner and with the effect aforesaid, all the rights of said nation in said lands upon the same terms as to payment as is provided in the agreement made with the Creek Indians of date January nineteenth, eighteen hundred and eighty-nine, and ratified by the present Congress; and if said Cherokee nation shall accept, and by act of its legislative authority duly pass, ratify the same, the said lands shall thereupon become a part of the public domain for the purpose of such disposition as is herein provided, and the President is authorized as soon thereafter as he may deem advisable, by proclamation, to open said lands to settlement in the same manner and to the same effect, as in this act provided concerning the lands acquired from said Creek Indians, but until said lands are opened for settlement by proclamation of the President, no person shall be permitted to enter upon and occupy the same, and no person violating this provision thall be permitted to enter any of said lands or acquire any right thereto."

Counsel for appellant contends that by the terms of this act all persons were prohibited from entering upon and occupying any of the lands west of the ninety-sixth degree of longitude, no matter whether it was lands claimed by the Cherokee or other Indians; that the Ponca reservation is west of the ninety-sixth degree of longi-


North
R. L. Pinchbonner No 1109
E. C. Forney } p 58
Kansas.
West
Land Opened to Settlement.
Osage Reservation
East
Texas
Settled portion of Oklahoma.
South

tude and therefore no one could go upon it until thrown open to settlement, which has not yet been done. It is true that the section just quoted provides that no person shall be permitted to enter upon and occupy any of the lands referred to and that no person violating the provisions hereof shall be permitted to enter any of the lands described or acquire any right thereto, and it is also true that this section includes the Ponca Indian reservation, but this act must be considered in the light of subsequent acts of Congress, and the President's proclamation opening the Cherokee lands to settlement; and in order that a more complete understanding of the facts may be had we here give a map of these different reservations and lands:

(Here follows diagram marked p. 58.)

59 We will now notice the provisions of section ten of the act of Congress of March 3rd, 1893:

"The President of the United States is hereby authorized, at any time within six months after the approval of this act and the acceptance of the same by the Cherokee nation as herein provided, by proclamation, to open to settlement any or all of the lands not allotted or reserved, in the manner provided in section thirteen of the act of Congress approved March the second, eighteen hundred and eighty-nine, entitled 'An act making appropriations for the current and contingent expenses of the Indian Department and for fulfilling treaty stipulations with various Indian tribes, for the year ending June the thirtieth, eighteen hundred and ninety, and for other purposes, etc."

Section thirteen of the act of March second, 1889, refers to what sections shall be reserved for school land, length of residence, amount to be paid, qualifications of entrymen, etc., and then section ten of the act of March 3d, 1893, concludes:

"No person shall be permitted to occupy or enter upon any of the lands herein referred to, except in the manner prescribed by the proclamation of the President opening the same to settlement; and any person otherwise occupying or entering upon any of said lands shall forfeit all right to acquire any of said lands. The Secretary of the Interior, shall, under the direction of the President prescribe rules and regulations, not inconsistent with this act, for the occupation and settlement of said lands, to be incorporated in the proclamation of the President, which shall be issued at least twenty days before the time fixed for the opening of said lands."

Then finally in the President's proclamation we find this language:

"Said lands so to be opened as herein proclaimed, shall be entered upon and occupied only in the manner and under the provisions following, to wit:

A strip of land, one hundred feet in width, around and immediately within the outer boundaries of the entire tract of the country, to be opened to settlement under this proclamation, is hereby temporarily set apart for the following purposes and uses, viz:

Said strip, the inner boundary of which shall be one hundred feet from the exterior boundary of the country known as the Cherokee Outlet, shall be opened to occupancy in advance of the day and hour named for the opening of said country, by persons expecting and intending to make settlement pursuant to this proclamation. Such occupancy shall not be regarded as trespass, or in violation of this proclamation, or of the law under which it is made; nor shall any settlement rights be gained thereby."

Appellant insists that it was intended by this language to set apart a strip of land one hundred feet wide around all of the Indian country west of the ninety-sixth degree of longitude. This would place the line from which the run could be made from the east all the way from twelve to fifty miles east of the land actually opened to settlement. In other words, persons desiring to make the run from the east would have to run across a strip of land from twelve to fifty miles wide before they would reach the edge of the land which was to be opened to settlement and entry. We cannot agree with this view of the law, because it will be presumed that the President did that which he had a lawful right to do, and it is questionable if he had the right to open up, even temporarily for the use of those who wished to make the run, a strip of land one hundred feet wide off of the east side of the Osage Indian reservation and deprive the Indians and their lessee of the occupancy thereof even for the twenty-eight days intervening between the proclamation and the date of opening, while he did have the undoubted right to open up a strip one hundred feet wide immediately within the outer lines of the land actually opened up to settlement. And this is what we think he did. These are the lands which he had in mind when he wrote the proclamation. He was not then trying to keep people out of the lands which the Government had not even treated for, but out of the lands which he was proclaiming should on a certain day be opened to settlement; and when he referred to "a strip one hundred feet wide from the exterior of the country known as the Cherokee Outlet," he evidently meant that country known as the Cherokee Outlet which was then being opened to settlement and this theory is strengthened by the language used in other portions of the proclamation. The President says:

60 "Now, therefore, I Grover Cleveland, President of the United States, by virtue of the power in me vested by the statutes hereinbefore mentioned, and by other the laws of the United States, and by several agreements, do hereby declare and make known that all the lands acquired from the Cherokee Nation of Indians, the Tonkawa tribe of Indians, and the Pawnee tribe of Indians, by the three several agreements aforesaid, will, at the hour of twelve o'clock noon (central standard time) on Saturday the sixteenth day of the month of September, A. D. eighteen hundred and ninety-three, and not before, be opened to settlement under the terms of and subject to all the conditions, limitations, reservations, and restrictions contained in said agreements, the statutes above specified, the laws of the United States applicable thereto and the conditions prescribed by this proclamation, saving and excepting lands described and

identified as follows, to wit: The lands set apart for the Osage and Kansas Indians (describing them); the lands set apart for the Confederate Otoe and Missouri tribes of Indians, (then describing the lands); and the lands set apart for the Ponca tribe of Indians, (then describing these lands)" and then the proclamation exempts certain other reservations and lands.

From this language it will be seen that the President excepted from this opening the Osage reservation, the Kansas reservation, the Otoe and Missouri reservation and the Ponca reservation, and then finally uses the language "said lands so to be opened as herein proclaimed, shall be entered upon and occupied only in the manner and under the provisions following, to wit:

"A strip of land, one hundred feet in width around and immediately within the outer boundaries of the entire tract of country, to be opened to settlement under this proclamation, is hereby temporarily set apart for the following purposes and uses, etc."

This language expressly sets apart a strip within the outer boundaries of the entire tract of country *to be opened to settlement* under the proclamation; and although it continues with the expression "said strip, the inner boundary of which shall be one hundred feet from the exterior boundary of the country known as the Cherokee Outlet," it must be remembered that the Indian reservations had been excepted by the President before he reached this point in the instrument, leaving only the lands to be opened to settlement. But the President continues in the same paragraph, by saying: "Such occupancy shall not be regarded as trespass or in violation of this proclamation, or of the law under which it is made; nor shall any settlement rights be gained thereby." If this strip on the east was from twelve to fifty miles east of the lands to be opened to settlement why provide that such occupancy should not be regarded as trespass, and that no settlement rights should be gained thereby? In fact why do the absurd thing of granting persons the right to start into a race for a home fifty miles away, on the east of the land to be opened when such persons could make the race from either the north, south or west and start from the outer line of the land to be opened? The President must have known that no man would run from the east if he had to start from the east line of the Osage Indian reservation, and we assume that the President did not intend to give persons the right to do that which no sane person would do. The one-hundred-foot strip, was a strip of land one hundred feet wide around the land actually opened up to settlement. But counsel for appellant says if this be the construction to be placed upon the proclamation then persons could have gone into the country on the railroad right of way or on school land or upon allotments. We think not. In construing a law or proclamation we should always bear in mind the purpose of the law or instrument. These lands to be opened joined right up against lands owned and occupied by individuals, on every side except the east, and it was necessary to give the people a place all along the line from which they could have an equal start in the race; hence the one-hundred-foot strip. If the one-hundred-foot strip had not been set apart, those who in-

tended to make the race would have been compelled to start from the highway on the section lines which led into the country, and these were only four rods wide and are a mile apart, or they would have been compelled to pay license to make the race from the lands adjoining the lands to be opened, for which privilege in many cases a large sum of money would have been asked, thus giving a decided advantage to the rich; and the same thing might have been true of the Indian reservations. The hundred-foot strip gave all an
61 equal show. It is alleged, though that the defendant started from that part of the Outlet known as the Ponca reservation. From this allegation it will be seen that he was within the Ponca reservation before the hour of opening, and it is contended that the act of March 2nd, 1889, prohibited persons from entering upon and occupying any of the lands west of the ninety-sixth degree of longitude before the same was opened to settlement. This is true but the act of March 3rd, 1893, modified the act of March 2nd, 1889, to the extent that one who did not enter the lands opened to settlement in violation of the President's proclamation, and who was otherwise qualified could make entry. Congress and the President were dealing with the lands to be actually opened to settlement, and the fact that the defendant was within the Ponca Indian reservation prior to the time of opening did not disqualify him from making homestead entry on a tract within the country opened to settlement on September 16th, 1893.

For the reasons herein given the judgment of the lower court is hereby affirmed, at the cost of the appellant.

Concurring: Burford, C. J., Gillette and Beauchamp, JJ.

Not sitting: Hainer, J., who tried the case below, and Pancoast, J., who was of counsel.

Absent: Irwin, J.

62 And on the 18th day of July, 1902, there was filed in said supreme court a petition for appeal, which petition reads in words and figures, as follows, to wit:

63 In the Supreme Court of the Territory of Oklahoma.

ROBERT L. WINEBRENNER, Plaintiff in Error,
vs.
EDWARD C. FORNEY, Defendant in Error.
} Petition for Appeal.

The above-named plaintiff in error conceiving himself aggrieved by the judgment of the supreme court of the Territory of Oklahoma, rendered and delivered on the 15th day of July, 1902, affirming the judgment of the district court of Kay county in said Territory, sustaining the demurrer of the defendant in error to the petition of plaintiff in error, does hereby appeal from said order, judgment and decree, to the Supreme Court of the United States, for the reasons specified in the assignment of error, which is filed herewith, and made a part hereof, and he prays that this appeal may be allowed, and that a transcript of the record, proceedings and papers upon which said judgment of affirmance was made, duly authenticated

by the clerk of this court, may be sent to the Supreme Court of the United States, and that the court may fix a supersedeas bond of the said appellant, to be given within a reasonable time, and enter all necessary orders herein allowing the foregoing appeal.

S. H. HARRIS AND
JOHN W. SHARTEL,
Att'ys for Plaintiff in Error.

[Endorsed:] 1169. Winebrenner *vs.* Forney. Petition for appeal. Filed July 18, 1902. Benj. F. Hegler, clerk sup. court.

64 And afterward, on the same day, July 18th, 1902, there *was* filed in said supreme court in said cause, an assignment of errors, and affidavit as to amount involved in controversy, which read in words and figures as follows, to wit:

65 In the Supreme Court of the Territory of Oklahoma.

ROBERT L. WINEBRENNER, Plaintiff in Error,
vs.
EDWARD C. FORNEY, Defendant in Error.

Assignment of Errors on Appeal.

Now, on this 18th day of July, A. D. 1902, comes the said plaintiff in error Robert L. Winebrenner, by S. H. Harris and John W. Shartel, his solicitors, and says, that the decree and judgment rendered in said cause on the 15th day of July, A. D. 1902, affirming the judgment of the district court of Kay county, is erroneous and against the justice and rights of said plaintiff in error, for the following reasons to wit:

First. That the said supreme court erred in affirming the judgment of the district court, and in not reversing the same as prayed for in the petition in error in said cause:

Second. That the said supreme court erred in not reversing the judgment of the said district court sustaining the demurrer to the amended petition of plaintiff in error, and in not remanding said cause to the said district court with direction to overrule said demurrer:

Third. That the said supreme court erred in not holding and deciding that the 2″ amended petition of plaintiff in error stated facts sufficient to require the cancellation of the patent of the defendant in error, to the land in question:

Fourth. That the said supreme court erred in holding and deciding that the defendant in error was not disqualified to hold and acquire title to the land in question by prior settlement thereon, by reason of his having entered upon said land immediately after twelve o'clock, noon, September 16th, 1893, from the Ponca
66 Indian reservation, in the country known as the Cherokee Outlet:

Fifth. That the said supreme court erred in not holding

and deciding that the defendant in error, Edward C. Forney, was, and is, disqualified to take and hold land in the Cherokee Outlet, and the land in question, by virtue of prior settlement, by reason of his having entered upon said land from the Ponca Indian reservation, and by reason of having been upon said Indian reservation, and within the country known as the Cherokee Outlet, prior to twelve o'clock, noon, September, 16th, 1893.

Wherefore, the said plaintiff in error prays, that the said decree, judgment and order of the said supreme court of Oklahoma Territory be reversed, and that the said court may be directed to enter a decree reversing the said cause, and remanding the same to the district court of the county of Kay, Territory of Oklahoma for further proceedings in accordance with law.

S. H. HARRIS AND
JNO. W. SHARTEL,
Att'ys for Plaintiff in Error.

[Endorsed:] 1169. Winebrenner *vs.* Forney. Assignment of errors. Filed July 18, 1902. Benj. F. Hegler, clerk sup. court.

67 TERRITORY OF OKLAHOMA, } ss:
Logan County, }

S. H. Harris being first duly sworn says, that he is well acquainted with the property in controversy in the foregoing case of Robert L. Winebrenner *vs.* Edward C. Forney, and with the value of said property, and the matter in controversy; and that there is more than five thousand ($5000) dollars involved in said litigation between the said parties, exclusive of costs, and that the land in question is now, and has at all times during this litigation, been worth more than the sum of five thousand ($5000) dollars.

S. H. HARRIS.

Subscribed and sworn to before me this July 18, 1902.
[SEAL.] BENJ. F. HEGLER,
Clerk Sup. Court.

[Endorsed:] 1169. Winebrenner *vs.* Forney. Affidavit. Filed July 18, 1902. Benj. F. Hegler, clerk sup. court.

68 And thereafter, on the same day, to wit, July 18th, 1902, there was filed in said supreme court in said cause, an order allowing appeal, which order reads in words and figures as follows, to wit:

69 In the Supreme Court of the Territory of Oklahoma.

ROBERT L. WINEBRENNER, Plaintiff in Error,
vs.
EDWARD C. FORNEY, Defendant in Error. } Order.

Now on this 18th day of July, A. D. 1902, comes S. H. Harris and John W. Shartel, solicitors for the plaintiff in error in this cause,

and present to the court the application and petition of plaintiff in error for an appeal to the Supreme Court of the United States, from the judgment and decree rendered in this court on the 15th day of July, A. D. 1902, affirming the judgment of the district court of Kay county in this cause.

And plaintiff in error having filed with said application and petition for an appeal, his assignment of errors, and presented said application in open court, it is by the court ordered, that the said appeal to the Supreme Court of the United States, be, and the same is hereby granted, and the clerk of this court is hereby directed to certify a full, true and correct transcript of the record of this court, to the Supreme Court of the United States; and upon the further application of plaintiff in error, that the amount of the supersedeas bond be fixed to supersede the judgment of this court in the premises, and it being made to appear to this court, that the value of the property in controversy exceeds the sum of five thousand ($5000) dollars, exclusive of costs, and that this is a proper case of appeal to the Supreme Court of the United States, it is by the court ordered, that upon giving of an undertaking in the sum of 200.00 dollars, to be approved by the clerk, of this court within fifteen days from this date, the said appeal shall operate as a supersedeas, and the chief justice of this court is further directed to attest and sign the citation in said cause on such appeal.

JNO. H. BURFORD,
Chief Justice Supreme Court of Oklahoma Territory.

[Endorsed:] 1169. Winebrenner *vs.* Forney. Order allowing appeal. Filed July 18, 1902. Benj. F. Hegler, clerk sup. court.

70 And thereafter, to wit, on the 31st day of July, 1902, there was filed in said supreme court in said cause, a supersedeas bond, which reads in words and figures as follows, to wit:

71 In the Supreme Court of the Territory of Oklahoma.

ROBERT L. WINEBRENNER, Plaintiff in Error,
vs.
EDWARD C. FORNEY, Defendant in Error.

Undertaking on Appeal.

Know all men by these presents, that we, Robert L. Winebrenner as principal, and Park Bridges and W. H. Poffenberger as sureties, are held and firmly bound unto the defendant in error, Edward C. Forney in the full and just sum of two hundred ($200) dollars to be paid to the said Edward C. Fornwy, his certain attorneys, executors, administrators, or assigns, to which payment well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally by these presents.

Witness our hands this twenty-ninth day of July, in the year of our Lord, one thousand nine hundred and two.

Whereas, lately at a session of the supreme court of the Territory

of Oklahoma, in a suit pending in said court, wherein Robert L. Winebrenner was plaintiff in error, and Edward C. Forney was defendant in error, in which court and cause, a judgment and decree was rendered on the 15th day of July, in the year of our Lord, one thousand nine hundred and two, adverse to the interest of said plaintiff in error, and affirming the judgment of the district court of Kay county in favor of defendant in error, and against the plaintiff in error, and the said Robert L. Winebrenner having, on the 17th day of July, in the year of our Lord, one thousand nine hundred and two, appealed from said judgment and decree to the Supreme Court of the United States, and having filed the said appeal in the office of the clerk of said court to reverse the said judgment in the aforesaid suit, and procured citation to issue to the said Edward C. Forney,
72 citing and admonishing him to be, and appear at a session of the Supreme Court of the United States to be holden at the city of Washington, on the 16th day of August, next: Now, the condition of the above obligation is such, that if the said Robert L. Winebrenner shall prosecute said appeal to effect, and answer all damages and costs, if he fail to make the said plea good, then the above obligation to be void, else to remain in full force and virtue.

ROBERT L. WINEBRENNER.
PARK BRIDGES.
W. H. POFFENBERGER.

The foregoing undertaking accepted, and sureties approved by me, this 31st day of July, A. D. 1902.

BENJ. F. HEGLER,
[SEAL.] *Clerk of Supreme Court.*

73 *Valuation of Sureties.*

TERRITORY OF OKLAHOMA, } ss:
Kay County, }

Park Bridges being first duly sworn, says that he is surety on the above and foregoing undertaking, and that he is worth the sum of four hundred dollars, over and above all his debts, liabilities and exemptions.

PARK BRIDGES.

Subscribed and sworn to before me this 29 day of July, 1902.

E. E. CASS,
[SEAL.] *Notary Public.*

My commission expires 6" day of July, 1903.

TERRITORY OF OKLAHOMA, } ss:
Kay County, }

W. H. Poffenberger being first duly sworn, says that he is surety on the above and f-regoing undertaking, and that he is worth the sum

of four hundred dollars, over and above all his debts, liabilities and exemptions.

W. H. POFFENBERGER.

Subscribed and sworn to before me this 29 day of July, 1902.

E. E. CASS,
Notary Public.

[SEAL.]

My commission expires on the 6" day of July, 1903.

74 TERRITORY OF OKLAHOMA, } ss:
Kay County, }

—— —— being first duly sworn, says that he is surety on the above and foregoing undertaking, and that he is worth the sum of — dollars, over and above all his debts, liabilities and exemptions.

—— ——.

Subscribed and sworn to before me this — day of ——, 1902.

—— ——.
Notary Public.

My commission expires on the — day of ——, 190–.

TERRITORY OF OKLAHOMA, } ss:
Kay County. }

—— —— being first duly sworn, says that he is surety on the above and foregoing undertaking, and that he is worth the sum of — dollars, over and above all his debts, liabilities, and exemptions.

—— ——.

Subscribed and sworn to before me this — day of ——, 1902.

—— ——,
Notary Public.

My commission expies on the — day of ——, 190–.

Endorsed on the back as follows, to wit: 1169—Winebrenner *vs.* Forney—Appeal bond—Filed July 31, 1902. Benj. F. Hegler, clerk supreme court.

75 Supreme Court of Oklahoma Territory.

I, Benj. F. Hegler, clerk of the supreme court of the Territory of Oklahoma, do hereby certify that the foregoing 74 pages, numbered from 1 to 74 inclusive, are a true and complete transcript of the record and all proceedings in said supreme court in the cause of Robert L. Winebrenner, plaintiff in error, *vs.* Edward C. Forney, defendant in error, as the same remain upon the files and record of said supreme court.

In testimony whereof, I hereunto subscribe my name and affix the seal of said supreme court, at the city of Guthrie, this 31st day of July, A. D. 1902.

[Seal Supreme Court, Territory of Oklahoma.]

BENJ. F. HEGLER,
Clerk of the Supreme Court of the Territory of Oklahoma.

Endorsed on cover: File No. 18,637. Territory of Oklahoma supreme court. Term No. 409. Robert L. Winebrenner, appellant, *vs.* Edward C. Forney. Filed August 4", 1902.

Office Supreme Court U. S.
FILED
OCT 17 1902
JAMES H. MCKENNEY
Clerk.

No. 409.

Filed Harris, Start & Harris
for Appellant

Supreme Court of the United States.

OCTOBER TERM, 1902.

Filed Oct. 17, 1902.

No. 409.

ROBERT L. WINEBRENNER, Appellant,

vs.

EDWARD C. FORNEY, Appellee.

APPEAL

FROM

THE SUPREME COURT OF OKLAHOMA TERRITORY.

MOTION TO ADVANCE BY APPELLANT.

S. H. HARRIS,
Attorney for Appellant.

Judd & Detweiler,
City of Washington.

IN THE

Supreme Court of the United States.

October Term, 1902.

No. 409.

ROBERT L. WINEBRENNER, *Appellant*,

vs.

EDWARD C. FORNEY, *Appellee.*

MOTION TO ADVANCE CAUSE.

Now comes the appellant in the above-entitled cause and moves the Court to advance the said cause, and set the same for hearing on or about the 19th day of January, 1903, or any date subsequent thereto that will insure a disposition of the cause at the present term of the Court, and as ground for the said motion appellant states:

That this cause presents a single question for determination by the Court, and that is whether or not persons who made the race for land in the Cherokee Outlet, on the 16th day of September, 1893, from an Indian reservation within the outer boundaries of the country known as the Cherokee Outlet, were and are disqualified by reason thereof from holding and acquiring a valid patent to homestead land in said outlet under the homestead laws of the United States.

During the year 1898 a large number of cases were pending in the Supreme and inferior courts of the Territory of Oklahoma, instituted by persons who had made the race for land from the Indian reservation, and to whom the land had been awarded by the Land Department, to recover possession of the land awarded to them, and remove therefrom

contestants who had made the entry or run for land from the outer boundaries of the Cherokee Outlet. These actions were at that time termed proceedings by Mandatory Injunction. In order to settle the question as to whether or not patents issue to persons who had made the race from Indian reservations, the homestead claimants who were opposing that class of entrymen entered into a combination or arrangement by which they were to share equally the expenses of bringing a case to this Court for the final determination of the question in dispute, and, accordingly, the case of Black *vs.* Jackson was appealed to the Supreme Court of the Territory and from there to this Court. On account of the fact that the Supreme Court of Oklahoma Territory declined to pass upon the principal question involved, this Court also declined to determine the legality of the entry for lands from the Indian reservation, except in so far as the order of the Court commanding the overruling of the demurrer to Black's answer incidentally determined the question.

That persons in interest with Mr. Black delayed the trial of their cases in the District and Supreme Court as long as possible, but, prior to the decision by this Court of the Black-Jackson case, a number of the cases had been decided in the Supreme Court of Oklahoma Territory.

After the Black-Jackson decision was rendered the Oklahoma Supreme Court granted a rehearing in the mandatory injunction cases recently disposed of by them, but did not render a decision upon the rehearing until July of the present year. After this decision these cases were remanded to the district courts of Kay and Noble counties in said Territory, and stand for trial as suits in the nature of ejectment.

After the appeal of Black's associates and other persons opposing the entrymen from Indian reservations in the mandatory injunction cases these successful contestants commenced forcible entry and detainer suits, and in some instances ejectment suits, to recover the portion of the land held by the unsuccessful contestants, under order of super-

sedeas, and in that order two, three, and, in some instances, as high as four or five suits were pending between the same parties, all depending finally upon the question as to whether or not the run for lands was legally made from the Indian reservations.

It being impossible to secure a decision upon the question of the legality of the run from the Indian reservations until the issuance of patent, those who made the run from the boundary of the Cherokee Outlet were compelled to await the issuance of patent to one of the reservation runners before they could present a case requiring a determination of the main question involved, and such case was begun as soon as patent had issued to Edward C. Forney, the appellee herein.

That said cause was pushed as rapidly as possible through the district court of Kay County to the Supreme Court of Oklahoma Territory, and appealed to this Court immediately after the decision by the Supreme Court of Oklahoma Territory, and is docketed herein as case No. 409 for this term, but will probably not be reached for decision at this term unless advanced.

There has now accumulated in the district courts of Kay and Noble counties, and in the Supreme Court of Oklahoma Territory, one or more suits between all of Black's associates and the reservation runners, and many of such cases have already been decided in the Supreme Court of said Territory.

The question of the validity of the entry from the Indian reservation is in controversy between such reservation runners and about fifteen of the associates of Black, but the total number of cases pending between said parties in the nature of ejection suits, actions of trespass, forcible entry and detainer, and for the recovery of crops, amounts to about forty.

That the Supreme Court of said Territory has decided the case of Penny *vs.* McClung, and an action of forcible entry and detainer which is now pending in this Court on

writ of error, and said Supreme Court has recently decided the case of McClung *vs.* Penny, an action of ejectment involving the same land; and said Supreme Court has also decided the case of Cunningham *vs.* Morris, Anderson *vs.* Ferguson, and McDonald *vs.* Brady, all being actions of forcible entry and detainer, and said actions must be appealed to this Court before another term of this Court would be held, in order to prevent the return of mandates therein to the district courts, and entry and execution of judgment thereon.

That all of said cases, being about forty in number, pending in the said courts of Oklahoma, will be finally determined before another term of this Court, and before disposition could be made of this case unless advanced and disposed of at the present term.

That the pieces of land in controversy are worth, on an average, about seven thousand dollars, about one hundred and five thousand dollars in all. That patents have not issued to many of such tracts of land, and if the litigation in regard to possession should be terminated before final disposition of this case, and Black's associates ousted therefrom, the land would be immediately sold by a relinquishment to the Government of the United States, and the filing thereon by the purchaser, as has already been done in all cases where Black's associates have been ousted of possession, and these parties who made the race for lands from the outer boundary in good faith, and who are urging the consideration of the legal question involved through many years and at a great outlay of money, would be denied the benefits of any decision that might be rendered favorable to them by reason of the delay in procuring that decision.

That the expenses of carrying any of the pending cases through the Supreme Court of Oklahoma Territory and through this Court is about seven hundred dollars, and the only question that can possibly be determined in any of said cases relative to the merits of the controversy between

the parties, is the question presented in this case, and all of said expenses and the loss of said land, in case the contention of Black and his associates is correct, can be prevented by the advancement of this cause, and decision thereof at the present term of this Court.

That the Supreme Court of Oklahoma Territory has been appealed to to delay the decision of other cases involving the same question until decision of this Court can be had in this cause, but have refused to consent to such delay, and have not only decided such cases promptly as they were reached upon the docket of such court, but have taken up and decided said cases out of their order and as fast as they were filed and presented in said court, and it is impossible to secure the relief requested in this motion except in the manner as herein requested.

Respectfully submitted,

S. H. HARRIS,
JOHN W. SHARTEL,
J. J. DARLINGTON
Attorneys for Appellant.

IN THE SUPREME COURT OF THE UNITED STATES.

ROBERT L. WINEBRENNER, *Appellant*, *vs.* EDWARD C. FORNEY, *Appellee.*	October Term, 1902. No. 409.

NOTICE.

To EDWARD C. FORNEY:

You are hereby notified that the appellant, Robert L. Winebrenner will, on Monday, the tenth day of November, 1902, present to the above-entitled court, in the above cause,

his motion to advance said cause, a true copy of which is attached to this notice.

Dated this 14th day of October, 1902.

S. H. HARRIS,
Attorney for Appellant.

DISTRICT OF COLUMBIA, *ss:*

Personally appeared before me, the undersigned Notary Public in and for the said District of Columbia, S. H. Harris, who, being first duly sworn, says that he is one of the attorneys for the appellant in the above cause; that he served the foregoing notice of motion to advance said cause, together with a true copy of said motion, upon the appellee, Edward C. Forney, on the 14th day of October, 1902, by enclosing said notice and copy of motion in an envelope addressed to the said Edward C. Forney, at Pierceton, Kay County, Oklahoma Territory, the place of residence and post-office address of said Forney, and by placing upon said envelope a sufficient amount of postage, and by depositing the same in the post office at the City of Washington; that in the usual course of mail, the said appellee will receive said notice on Friday, the 17th day of October, 1902; that the said appellee has no attorney of record in this court, and so far as affiant is informed, has not employed an attorney in this cause in this court.

S. H. HARRIS.

Subscribed and sworn to before me, this 14th day of October, 1902.

THOMAS HOW YEAGER,
Notary Public, D. C.

[NOTARIAL SEAL.]

In the Supreme Court of the United States.

ROBERT L. WINEBRENNER, APPELLANT,	No. 409.
v.	Oct. Term,
EDWARD C. FORNEY, APPELLEE.	1902.

Statement of Facts.

This action was originally commenced in the district court of Kay County, Oklahoma Territory, by Robert L. Winebrenner against Edward C. Forney, for the recovery of title to the southwest quarter of section 19, township 26 north, range 1 east of the Indian Meridian, in Kay County, Oklahoma Territory. The case was disposed of in the trial court upon demurrer to the second amended petition of the plaintiff, which petition appears on pages 20 to 32 of the record. In substance, the plaintiff alleged that he was a native born citizen of the United States, and that prior to the opening of the Cherokee Outlet to settlement on September 16, 1893, he had never entered upon or occupied any portion of said Outlet, and was not then or at the time of filing said amended petition, the owner of one hundred and sixty acres of land in any other State or Territory. That prior to the opening of said Outlet he procured a booth certificate, entitling him to make homestead entry. That he was of proper age, the head of a family, and in all respects qualified at the time of the opening of said Outlet to enter and acquire title to a homestead therein. That at the time of the opening of said Outlet at noon on September

16, 1893, he entered upon said Outlet from the outer boundary thereof for the purpose of immediately securing and settling upon a homestead therein, and immediately after said opening he entered upon and occupied the quarter section of land above described, the same being a portion of the homestead lands opened to settlement on that day. That shortly after his entry upon said lands, he saw indications that it had been claimed and occupied by some one else, and he withdrew therefrom, but on the 22nd day of September, 1893, becoming satisfied that the land was not lawfully occupied, he returned thereto, and continued his improvements thereon, and has ever since occupied and improved the same in compliance with the homestead laws of the United States, except when excluded from said land, or portions thereof, by mandatory injunction orders of the district court of said county. That he placed a greater portion of said land in cultivation immediately after his said occupancy, and that the defendant, Forney, on the 23rd day of September filed homestead entry upon said land in the Land Office at Perry, O. T., and the defendant immediately thereafter tore down a portion of plantiff's fence, and entered into possession of a part of said land. That within three months after making said settlement, plantiff filed his contest against said homestead entry, claiming prior settlement upon said land, and setting forth that the defendant was disqualified to enter and acquire title to same, by reason of having entered upon the country known as the Cherokee Outlet prior to 12 o'clock, noon, Central Standard time, September 16, 1893, and by reason of his being within the outer boundaries of that country, which was prohibited at the time of the opening of lands in said Outlet to settlement, and at the hour of opening said lands to settlement the defendant was upon or near the western boundary of the Ponca Indian Reservation, and within the

country known as the Cherokee Outlet. That trial was had of said contest, and said contest was continued through all the departments and proceedings provided for contesting title to lands under the homestead laws of the United States, and copies of the decisions of the various departments are set forth as a part of said second amended petition. That as a result of said contest proceedings, the said land was unlawfully awarded to the said defendant, Forney. That the final proof of the said Forney for said land was accepted, and patent issued to him on the first day of October, 1900. That said patent was issued as a result of a misunderstanding and misapplication of the law by the officers of the Land Department and the Honorable Secretary of the Interior, with reference to the qualification of Forney to acquire title to the land, and that but for the mistakes and misapplication of the law on the part of the Land Department, the land would have been awarded, and patent issued, to this plaintiff, Winebrenner. That plaintiff tendered into court all costs and expenses laid out in acquiring said patent, and asked the Court to declare the said patent to be a title in trust for the benefit of the plaintiff and to decree a conveyance thereof to the plaintiff.

A demurrer was interposed to this second amended petition, and the same was sustained on the ground that the defendant Forney was not disqualified to hold and acquire title to land. The plaintiff declined to further plead, and the case was dismissed at the costs of the plaintiff, to all of which exceptions were taken, and an appeal prayed to the Supreme Court of the Territory. Record, pages 33 and 34.

On the 16th day of July, 1902, said judgment was affirmed by the Supreme Court of the Territory of Oklahoma. For the decision and opinion of said Supreme Court delivered and filed, see Record, pages 37 to 42.

On July, 18, 1902, an appeal was allowed to this Court, and by order of the Court the cause has been advanced to March 2, 1903.

The errors set forth in the appeal and relied upon herein are as follows:

First. That said Supreme Court erred in affirming the judgment of the District Court, and in not reversing the same as prayed for in the petition in error in said cause.

Second. That said Supreme Court erred in not reversing the judgment of said District Court sustaining the demurrer to the second amended petition of the plaintiff in error, and in not remanding said cause to said District Court with directions to overrule said demurrer.

Third. That said Supreme Court erred in not holding and deciding that the second amended petition of the plaintiff in error stated facts sufficient to require the cancellation of the patent of the defendant in error to the land in question.

Fourth. That said Supreme Court erred in holding and deciding that the defendant in error was not disqualified to to hold and acquire title to the land in question by prior settlement thereon, by reason of his having entered upon said land immediately after twelve o'clock, noon, September 16, 1893, from the Ponca Indian Reservation in the country known as the Cherokee Outlet.

Fifth. That said Supreme Court erred in not holding and deciding that the defendant in error, Edward C. Forney, was and is disqualified to take and hold land in the Cherokee Outlet and the land in question, by virtue of prior settlement, by reason of his having entered upon said land from the Ponca Indian Reservation, and by reason of having been upon said Indian Reservation, within the country known as the Cherokee Outlet, prior to twelve o'clock, noon, September 16, 1893.

As we understand the case, the sole matter of contention between the parties is as to the disqualification of Forney, by reason of his being within the prohibited territory as set forth in the second amended petition, and as found by the Land Department. The facts with reference to the entry and all matters in dispute between the parties in the contest proceeding being finally determined by the findings of the Land Department, the single question to be decided is as to the law in relation to the qualification of the appellee.

Brief and Argument.

The Court will take judicial knowledge of the general conditions surrounding the opening of the lands in the country known as the Cherokee Outlet. Smith *v.* Townsend, 148 U. S., 490.

The statutes of the United States with reference to the opening of lands in the Cherokee Outlet to settlement are referred to and set forth in detail in the Proclamation of the President, promulgated August 19, 1893. The Proclamation also contained rules and regulations governing the opening of said lands, prepared by the Secretary of the Interior. Prior to the opening of these lands, several tracts had been opened in what is now called Oklahoma Territory, and some slight changes in the language of the act prohibiting entry upon the lands in the Cherokee Outlet, as well as rules and regulations promulgated by the Secretary of the Interior, are doubtless due to the intention and purpose to avoid controversies which had formerly arisen.

It had generally been considered practically impossible to exclude people from the lands to be opened to settlement until the hour of the opening. Persons who entered upon the lands in advance of the time fixed for the opening were called "sooners," and every possible effort was made in the opening of the lands in the Cherokee Outlet to exclude sooners therefrom. The requirements with reference to

procuring booth certificates were for that purpose. The Secretary of War directed that soldiers patrol the country to be occupied, and forcibly exclude therefrom all persons entering in violation of law. A great many inquiries were made of the office of the Secretary of the Interior, as well as other offices of the Government, with reference to the proper construction of the various provisions of the act of Congress and the proclamation of the President opening the lands in the Cherokee Outlet to settlement, thereby necessitating contemporaneous construction of the law, both before and immediately subsequent to the opening. Some inquiries were made with reference to the right of persons to enter within the outer boundaries of the land described in the Act of Congress and the Proclamation, and to go upon Indian Reservations situated within and upon the Cherokee Outlet. These inquiries, or some of them, were submitted to the Assistant Attorney-General, and his opinion, holding that such entry could not be made, was widely published throughout the country, and especially in the vicinity of the boundaries of the lands to be opened. Agents of the Government in charge of the opening were all directed to inform all persons that entry upon Indian Reservations was forbidden, and all persons were so informed. Not only were intending settlers warned that such an entry would forfeit their rights to acquire land, but they were forcibly ejected from the country, aud in many instances were arrested and placed in the guard-house;by the soldiers. In one instance, at least, an attempt to defy the authority of the soldiers with reference to the time and manner of entering upon these lands resulted in the killing of the intending settler by the regulars. That more instances of the kind did not occur is unquestionably due to the fact that other fool-hardy attempts to defy the soldiery were not made.

This construction of the law and the proclamation of the President prevailed for more than three years, and until

after a change was made in the office of the Secretary of the Interior.

The crowd of people that collected upon the borders of the country known as the Cherokee Outlet has been estimated by the Secretary of the Interior, through information gained from his deputies on the ground, at more than one hundred thousand, and the general estimate by those familiar with the situation, places the number at about 150,000.

A number of persons, being able to evade the vigilance of the soldiers and agents of the Government, secreted themselves along the Arkansas River and in various places upon Indian reservations in the Outlet, and either before or at the time of opening the lands to settlement entered from those points of advantage, and some of these persons settled upon and claimed rich lands along the Arkansas River as homesteads. Probably twenty, altogether, of these claims have been maintained in the Department. Few, if any, of these persons made substantial improvements upon the lands, but made merely slight improvements and continued to protect their claims in a colorable way until the change in the holding by the Secretary of the Interior gave them a substantial basis for their claim to the lands. We refer to these matters briefly, because we think that the contemporaneous construction of the law, both by the Secretary of the Interior and the Commissioner of the General Land Office, the President of the United States and the Secretary of War, the vast number of intending settlers and the lawyers of the country who were their advisers, is entitled to consideration. As to the importance of the rule of contemporaneous construction, see

United States *v.* State Bank of North Carolina, 6 Peters, 29–40;
United States *v.* Moore, 95 U. S., 767;
United States *v.* Johnson, 124 U. S., 236;
Pennoyer *v.* McConnaughey, 140 U. S., 1;
United States *v.* Alabama, etc., Ry. Co., 142 U. S., 615.

The leading case in the Land Department following the original construction of the law and the proclamation is that of Cagle *v.* Mendenhall. This decision, while giving much valuable information with reference to the construction of the law and the circumstances attending the opening, rather discusses some special proceedings on the part of the Secretary and his assistants, than the general nature of the act and the proclamation. Whatever the reasons given may be, we think the decision was correct, and should have been adhered to. The parties affected by the subsequent change of ruling were persons who had entered upon the land on the day of the opening, or immediately thereafter, and for more than three years had expended not only their money and labor upon the improvement of the land, but had gone to large expense in defending their titles to the same, and a return to that doctrine at this time can affect no one except the few parties who have been contending since the opening of this country to settlement There is no case now pending in the courts of Oklahoma other than those between original settlers and contestants, and no decision now rendered upon the subject could be the basis of future contests or new litigation. The rights of all parties interested stand to-day where they stood on September 16, 1893, except that those persons who observed the commands of the officers of the Government, and yielded willing obedience to its agents and soldiers, would not only be allowed the land which we conceive to be theirs in equity and justice, but would be saved many years of labor and expense laid out by them in improving and defending their homes.

For a general review of the questions under consideration, we refer to Cagle *v.* Mendenhall, 20 L. D., 440 ; Senate Executive Document No. 78, 51st Congress, first session, being a letter from the Secretary of the Interior transmitted in response to Senate resolution of March 10, 1890, a compila-

tion concerning the legal status of Indians in the Indian Territory; Report of the Secretary of War of his proceedings in connection with the opening of the Cherokee Outlet; Act of Congress approved March 3, 1893, 27 Stats. at Large, 640; Proclamation of the President, 17 L. D., 230; Brady *v.* Williams, 25 L. D., 55–402; 23 L. D., 533.

The holdings of the Land Department have been somewhat peculiar. Aside from the conflict between the cases of Brady *v.* Williams and Cagle *v.* Mendenhall, there appear to be some very important inconsistencies. On the forenoon of September 16, 1893, certain parties acting in conjunction with the agent in charge of the Chilocco Indian School, procured an order from the Commissioner's Office permitting persons to enter upon homestead lands from the Chilocco Indian School Reservation. The contemporaneous construction of the Act and the Proclamation appears in this request and the reply. The telegram to the Commissioner represented that great damage might be done to the property of the United States upon the Chilocco Reservation. A telegram from the Commissioner was returned in the nature of an order, directing that the one hundred foot reservation be placed around and south of the Chilocco Indian School Reservation. The authority of the Commissioner or the Land Department to make this modification of the Act of Congress and the Proclamation of the President was presented to the Land Department in the case of Welch *v.* Butler, 21 L. D., 369, but the point was not discussed in the case, and the history of the run from the Chilocco Indian School Reservation was not even referred to. It was merely held that the departmental order excluding persons from the Indian Reservations in the eastern portion of the Outlet had no application to the Chilocco Indian School Reservation, in effect assuming that the Chilocco Indian School Reservation was not within the prohibited

district, although it had been so considered at the time that permission was requested to make entry therefrom, and a pretence made of extending a one hundred foot reservation around and south of this Indian School Reservation. The Chilocco Indian School Reservation is south of the south line of the State of Kansas, which was declared to be the north boundary of the country opened to settlement, and is within the land district assigned to the land office at Perry.

In Brady *v.* Williams, that portion of the decision in Cagle *v.* Mendenhall which assumes that the unlawfulness of the entry upon Indian Reservations in the eastern part of the Outlet is by virtue of an order of the Secretary of the Interior and the Secretary of War severely criticised, and the Honorable Secretary decides that the Secretary of the Interior had no authority to prescribe new rules and regulations after the promulgation of the Proclamation of the President. The Department has always refused to review or re-consider the doctrine of the case of Welch *v.* Butler, and we know of no case wherein the question as to the application of the Act of Congress and the Proclamation of the President with reference to the right to enter from the Chilocco Indian School Reservation has ever been referred to or discussed.

Even in case of doubt and uncertainty as to whether or not the Act of Congress and the Proclamation of the President would permit persons to go upon the Indian Reservations and make a run for homesteads from the western boundary thereof, we think the contemporaneous construction of the Act and the Proclamation, and the results of that construction, are fully sufficient to impel the court to the decision which would be in accord with the rights of the parties acquired by reason of compliance with the original construction of the law. We deny that there is any uncertainty as to the meaning and construction of the Act and the

Proclamation. Pursuant to the law, as declared in Smith v. Townsend, that the line of prohibition extended around the entire tract of country referred to and dealt with in opening the lands to settlement, an entire tract of country was at all times dealt with and referred to in opening the lands in the Cherokee Outlet. And this entire tract of country, specifically and unmistakably described by metes and bounds, is always referred to both in the Act and the Proclamation, when such Act and Proclamation have reference to the qualification of intending settlers, or the point from which they must start upon the race for lands. Section 14 of the Act approved March 2, 1889, is as follows:

"The President is hereby authorized to appoint three commissioners, not more than two of whom shall be members of the same political party, to negotiate with the Cherokee Indians, and with all other Indians owning or claiming lands lying west of the 96th degree of longitude in the Indian Territory, for the cession to the United States of all their title, claim or interest of every kind or character in and to said lands, and any and all agreements resulting from such negotiations shall be reported to the President and by him to Congress at its next session, and to the council or councils, nation or nations, tribe or tribes, agreeing to the same, for ratification, and for this purpose the sum of twenty-five thousand dollars, or so much thereof as may be necessary, is hereby appropriated, to be immediately available: *Provided*, that said commission is further authorized to submit to the Cherokee Nation the proposition that said nation shall cede to the United States, in the manner and with the effect aforesaid, all the rights of said nation in said lands, upon the same terms as to payment as is provided in the agreement made with the Creek Indians of date January 19, 1889, and ratified by the present Congress; and if said Cherokee Nation shall accept, and by act of its legislative authority duly passed, ratify the same, said lands shall thereupon become a part of the public domain for the purpose of such disposition as is herein provided, and the

President is authorized as soon thereafter as he may deem advisable, by proclamation to open said lands to settlement, in the same manner and to the same effect as in this act provided concerning the lands acquired from said Creek Indians, but until said lands are opened to settlement by proclamation of the President, no person shall be permitted to enter upon or occupy the same, and no person violating this provision shall be permitted to enter any of said lands or acquire any right thereto."

It will be noticed that this act makes no provision for the right of entry upon any of these lands, merely because the same may not be acquired by the United States under treaty with the Indians. That this prohibition is recognized and carried out through all subsequent laws, documents and proceedings, is evidenced by the Act of 1893 and the Proclamation of the President. The Proclamation recites that the Cherokees have ceded to the United States and relinquished and surrendered all their title, claim and interest of every kind and character in and to that part of the Indian Territory bounded on the west by the one hundredth degree of west longitude, on the north by the State of Kansas, on the east by the 96th degree of west longitude, and on the south by the Creek Nation, the Territory of Oklahoma, and the Cheyenne and Arapahoe Reservation. After referring to certain allotments to resident Cherokees, the Proclamation refers to the provision for the completion of title of the United States to certain portions or parcels of land within this entire tract, and, after enumerating certain reservations, authorizes the President of the United States, at any time within six months after the approval of the act and the acceptance of the same by the Cherokee Nation, by proclamation to open to settlement any or all of the lands not alloted or reserved.

We suggest again that there is nothing in the Act of 1893 that gives permission to enter upon any of the lands, whether

they should be opened or not, and the Act refers to all the lands west of the 96th degree, pursuant to the Act of 1889, and reiterates the prohibition as follows:

"No person shall be permitted to occupy or enter upon any of the lands herein referred to, except in the manner prescribed by the proclamation of the President opening the same to settlement, and any person otherwise occupying or entering upon any of said lands shall forfeit all right to acquire any of said lands. The Secretary of the Interior shall, under the direction of the President, prescribe rules and regulations not inconsistent with this Act for the occupation and settlement of said lands, to be incorporated in the proclamation of the President, which shall be issued at least twenty days before the time fixed for opening said lands."

The President was not authorized to prohibit anyone from entering upon any land, or any portion of the lands referred to in these Acts of Congress, but was authorized to open to settlement any or all of the lands. Treaties, allotments and surveys were not completed for some of the lands within this general tract, and therefore the lands were not opened to settlement, but the law with reference to entry upon the lands described by metes and bounds, as aforesaid, remained the same, and the President's Proclamation contains no prohibition, but only permission to enter upon certain described tracts. After fixing the county seats of the various counties within that portion of the territory opened to settlement, the President enumerates all tracts and parcels of land which are reserved from the opening, and here we think a very simple rule can be applied, to test the entire contention of the defendant in error. If these tracts and parcels of land reserved from settlement were not within the tract of country upon which entry was prohibited and that entire tract referred to and dealt with in the Act of Congress and the Proclamation of the Presi-

dent, we leave the question for its own answer, Why were they reserved from it? If they were not within, we see no reason for taking them out.

That portion of the proclamation with reference to permission to enter upon any portion of the tract of country referred to is as follows:

"A strip of land one hundred feet in width around and immediately within the outer boundaries of the entire tract of country to be opened to settlement under this proclamation is hereby temporarily set apart for the following purposes and uses, viz: said strip, the inner boundary of which shall be one hundred feet from the exterior boundary of the country known as the Cherokee Outlet shall be opened to occupancy in advance of the day and hour named for opening said country, by persons expecting and intending to make settlement pursuant to this proclamation. Said occupancy shall not be regarded as a trespass or in violation of this proclamation or the law under which it is made, nor shall any settlement rights be gained thereby."

This portion of the Proclamation, we think, does not apply to any tract of country except that tract of country described by metes and bounds in the Acts of Congress, and from which general tract these reservations had been made from settlement.

There were three general portions of this entire tract being dealt with, that were being opened to occupancy, with the exception of Indian allotments, school reservations, etc., which were the residue or western portion of the Cherokee Outlet not before conveyed to friendly Indians, the Ponca Indian Reservation and the Tonkawa Indian Reservation. These lands were acquired by separate treaties, and if the President had not been dealing with one entire tract, he doubtless would have referred to these three several tracts. At any rate, the only permission that is anywhere found, granting anyone the right to enter upon any portion of the

lands west of the 96th degree, and south of the south line of Kansas, etc., is contained in this part of the proclamation. All else is prohibition.

Again, this part of the proclamation, with the apparent intention of making all things positive and certain, declares that the inner boundary of this one hundred foot reservation or permission shall be one hundred feet from the exterior boundary of the country known as the Cherokee Outlet. But one country has ever been known, or ever will be known, as the Cherokee Outlet, and that is the lands west of the 96th degree, which were ceded to the Cherokee Indians for the purpose of an outlet west. Ever since such treaty or grant, this strip of country has been known and called the Cherokee Outlet, and is still known as and called the Cherokee Outlet, and we suggest will always be known by that name, regardless of who may become the owner of all or any portion thereof, or what municipality may exercise government and control over it. The name Cherokee Outlet is as familiar, and in as common use, to-day, as it ever was, although no one thinks of suggesting that the Cherokee Indians retain any title therein.

A portion of the Cherokee Outlet was embraced within the original Territory of Oklahoma, since which time it has been called the Cherokee Outlet, but for certainty has sometimes been referred to as "that part of the Cherokee Outlet within the Territory of Oklohoma," or the residue of the outlet not embraced in the territory as "that part of the Cherokee Outlet not embraced within the Territory of Oklahoma."

Section 9 of the Organic Act of the Territory of Oklahoma provides that:

"In addition to the jurisdiction otherwise conferred by this act, said District courts shall have and exercise exclusive original jurisdiction over all offenses against the laws of

the United States committed within that portion of the Cherokee Outlet not embraced within the boundaries of said Territory of Oklahoma as herein defined, and in all civil cases between citizens of the United States residing in such portion of the Cherokee Outlet, or between citizens of the United States, or of any State or Territory."

United States *v.* Pridgeon, 153 U. S., 48:

"An indictment in the District Court of the United States within and for Logan County, Oklahoma Territory, and for the Indian Country attached thereto, charging the commission of the offense of horse stealing in November, 1890, and laying the venue of the offense 'at and within that part of the Territory of Oklahoma attached for judicial purposes to Logan county', with a description of territory which included part of Oklahoma, and a part of the Cherokee Outlet, not in Oklahoma, and which averred the same to be 'then and there Indian country and the place then and there under the sole and exclusive jurisdiction of the United States of America,' will not be held to be fatally defective when attacked collaterally and by writ of habeas corpus."

Technically speaking, the Cherokee Outlet probably consisted of that portion of the Outlet remaining after the conveyance of certain parts to friendly Indians. It will be noticed that the President was careful to avoid any technical or strict application of his language, and therefore used the term "the country known as the Cherokee Outlet," and that definition has as definite a meaning to-day as it had then, and no citizen of the nation at all familiar with the history of the Indian Territory could possibly misunderstand the term, if used now, even after all portions of the country known as the Cherokee Outlet has ceased to be the property of or held for the use of the Cherokee Indians.

Decker *v.* A. T. & S. F. R'y Co., 3 Okla., 553.

The first subdivision of Section 10, of the Act of 1893,

27 Stats. at Large, page 640, appears to give a definition of the country "commonly called the Cherokee Outlet" that would admit of no doubt. That portion of the section is as follows:

"Section 10. That the sum of $295,736.00, payable as hereinafter provided, is hereby appropriated out of any money in the Treasury not otherwise appropriated, and the Secretary of the Interior is hereby authorized and directed to contract to pay $8,300,000.00, or so much thereof as may be necessary, in addition, to pay the Cherokee Indians for all the right, title, interest and claim which the said nation of Indians may have in and to certain lands described and specified in an agreement concluded between David H. Jerome, Alfred M. Wilson and Warren G. Sayre, duly appointed commissioners on the part of the United States, and Alias C. Boudinot, Joseph A. Scales, George Downing, Roach Young, Thomas Smith, William Triplett and Joseph Small, duly appointed commissioners on the part of the Cherokee Nation of Indians in the Indian Territory on the nineteenth day of December, 1891, bounded on the west by the one hundredth degree of west longitude, on the north by the State of Kansas, on the east by the ninety-sixth degree of west longitude, and on the south by the Creek Nation, the Territory of Oklahoma and the Cheyenne and Arapahoe Reservation, defined by Executive Order dated August 10, 1869, which said agreement is fully set forth in the message of the President of the United States, communicating the same to Congress, known as Executive Document No. 56 of the first session of the Fifty-second Congress, the lands referred to being commonly known and called the 'Cherokee Outlet.'"

This being the act under which lands in the Cherokee Outlet were opened to settlement, it is scarcely possible that the President and Secretary could have misunderstood the meaning of the term used by them. Again, the term "herein referred to," both in the act and the proclamation, is as comprehensive as the definition of the Cherokee Out-

let, because all the lands described in Section 10 are referred to, and the prohibition is reiterated, that no one would be permitted to enter upon any of those lands. It is immaterial whether one or more tracts within this general body of land was opened to settlement. The prohibition was not against entering upon any lands referred to in the Act and Proclamation "except such portions thereof as might be opened to settlement." It was against entering upon any lands, and permission was given to make entry in a certain way. The act gave ample authority to the President to open to settlement all the lands within the Cherokee Outlet if treaties had been completed. It is immaterial what title or interest the Cherokees hold in any or all of this tract of country. It is sufficient that it is particularly described, and entry prohibited upon any part of it, and the United States saw fit to avoid all controversy as to the ownership of the land by completing negotiations for each and every part of the land embraced within the description given in Section 10, whether the Cherokees held the whole title, or no title or interest.

It may be that the Delaware and Shawnee Indians had some interest in said tract of country, or the possibility may have existed that they had some interest. It is sufficient that said Section 10 makes provision for holding the money paid for the Cherokee Outlet until the interest of said Delaware and Shawnee Indians could be determined in the courts of the United States. The lands held in connection with the Cherokee Indian School were expressly reserved from settlement by said act, but the prohibition against entering upon the same was not modified or set aside. The President was authorized to make other reservations from settlement, but there is nothing in the act even intimating that the right to enter upon said lands was created merely because the President failed to declare them subject to

homestead entry. If the failure to declare any part of the lands subject to entry removed the prohibition against entry thereon for the purpose of making the race to other portions which were subject to homestead entry, then all reservations for schools, allotments, saline reservations, county reservations and public roads would have been subject to such occupancy, and this doctrine leads us back to the contention that was so positively and forcibly overthrown and denied in Smith *v.* Townsend: "It was evidently the intention of Congress to erect a wall around this entire tract of country."

Such was the declaration of the court under a statute that was not so definite and positive as the one under consideration. Congress, by positive language, made that plain which required the decision of the court in Smith *v.* Townsend, by prescribing the prohibited country by exact metes and bounds, and declaring that no one should enter upon any portion of that tract of country, except as permitted by the President, and we find nothing in the proclamation that can fairly be construed into permission to enter upon any portion of that tract of country, except the one hundred foot reservation around the outer boundary thereof, and the portions of the lands actually opened to homestead settlement.

We think that a portion of the decision in Cagle *v.* Mendenhall is inaccurate. A portion of that opinion seems to admit that the President intended to make a reservation of one hundred feet around the eastern portion of that part of the main body of the Cherokee Outlet opened to homestead settlement. It is altogether probable that the President and Secretary assumed that all persons knew the law with reference to the right to enter upon Indian reservations, and it was expected that the one hundred foot reservation would be used where it was lawful to use it.

One paragraph of the opinion indicates that the writer thereof understood the "Cherokee Outlet to mean that portion of the Outlet remaining after deducting Indian Reservations." These inaccuracies may be urged as weakening the decision as a matter of argument, but it still shows the construction of the law which controlled all persons except a few who defied any ruling or construction of law and rendered necessary the efforts of the departments of the Government, including the soldiers, to prevent such invasions.

The basis of the argument on behalf of the defendant in error is that the lands which had been sold to friendly Indians upon the Cherokee Outlet ceased to be a portion of the Cherokee Outlet. There is no other way in which they can construe the language of the proclamation and contend that the one hundred foot reservation was around less than the whole tract of country lying west of the 96th degree, etc. It requires but a moment's consideration to see that the proclamation cannot be so construed.

By the treaty of 1866, the United States had the right to settle friendly Indians in the Cherokee Outlet west of the 96th degree. Pursuant to this treaty, they not only settled the Osages, Kaws, Poncas, Otoes and Missourias, but they also settled the Pawnees and the Tonkawas inside the Outlet. The Pawnees were settled in pursuance of the provisions of Section 4 of the Act of April 10, 1876, 19 Stats. at Large, 28, the Nez Perces and Tonkawas pursuant to the Act of May 27, 1878, 20 Stats. at Large, 74, and the Chilocco Indian School Reservation was reserved by Executive Document dated July 12, 1884.

Assuming that the withdrawal of portions of these lands from the use and occupancy of the Cherokees denied to them the right to be thereafter included in the geographical designation or description of "the Cherokee Outlet," the

reservation of the Pawnees and Tonkawas, having been purchased by the United States and declared a part of the public domain, could not thereby have become a portion of the Cherokee Outlet. If they had ceased to be a portion of the Cherokee Outlet, there is nothing in this transaction that could again entitle them to that name. If we limit the last paragraph of that portion of the proclamation as referring to "so much of the country formerly known as the Cherokee Outlet as has not been sold or transferred by the Cherokee Indians," then we would exclude from the prohibited district these two reservations. If this contention is logical, it is a little surprising that, with all the cunning and ingenuity of those who, like the defendant in error, were disposed to resort to any means and defy any authority or power to gain an advantage in the race, did not discover their right to go upon these two reservations and settle prior to noon of September 16, 1893, or seize lands adjoining the borders thereof.

We are not aware that any difficulty has been encountered in ascertaining the meaning of the Act of Congress and the Proclamation of the President, except by such as have first departed from the plain language thereof, and indulged in speculation as to what the President probably said, or should have said. They have then presumed that the President could not have intended that a person should go to the eastern boundary of the Cherokee Outlet, from twelve to fifty miles from the valuable lands along the Arkansas River, in order to make the run. They have not troubled themselves with the presumption that the President did not intend that settlers should congregate along the middle of the main channel of the Arkansas River and remain there for several days waiting for the opening. Neither the case of Cagle *v.* Mendenhall, nor Brady *v.* Williams, deals with the question where the eastern

boundary would actually be, if it is not at the 96th degree. By the Proclamation of the President, it appears that the western boundary of the Osage Reservation is the middle of the main channel of the Arkansas River, and such is the treaty. The bed of this river is about one mile in width, and the stream, at low water, from four to eight hundred yards in width, and from five to fifteen feet deep. If the President intended that men should congregate along the western boundary of these Indian Reservations, he might have been considerate enough of human life and convenience to extend the temporary reservation at least to one bank or the other of the river.

The learned justice who delivered the opinion of the Supreme Court of the Territory of Oklahoma quotes only a portion of Section 10 of the act of 1893, not including in his quotation that portion of the section containing the description of the lands referred to in the part of the section quoted, and concludes that the "lands herein referred to" has reference to something other than the lands actually described in the act from which he is quoting. We do not think that this is a fair presentation of the language of the act, aside from the fact that the middle of a large river would be an uncomfortable place for even an Oklahoma boomer to camp temporarily, pending the opening of the homestead lands, and we might entertain another presumption with reference to the one hundred foot reservation on the western boundary or at the one hundredth degree. This reservation is from one hundred and fifty to one hundred and ninety miles from the valuable and desirable lands along the Arkansas Valley. The lands in the western portion of the Outlet were worthless, except for the grazing purposes, and probably not a single man started on the race for a homestead from the western border.

Considerable land has been taken for homesteads in the

western part of the Territory during the past two or three years, but, during the first two or three after the opening, no land was taken as homesteads in that part of the country, except lands that were watered, and that were valuable in connection with cattle ranges. It is probably fair to assume that the President had no idea of dictating to any one from what point they should run, but all must certainly agree that it was the intention of Congress, as well as of the President and of all the officers in charge of the opening, that all should have a fair and equal chance in the race. That the construction of the law by the Supreme Court of the Territory of Oklahoma would not be in accord with such a purpose is evident. This handful of men who defied the commands of the Government and evaded the vigilance of its troops, were not, and have no right to be, the pet creatures of the Government. If they be awarded the land which they claim, the wrong which results is done to every man who mingled with the throng upon the outer boundaries, because each and every one of them might have been the one to be denied his rights to a piece of land selected by a sooner who stole across the river, or who hid in the brush along its banks until the hour of the opening. These men on the border were virtually forced back from these points of advantage along the river by the bayonets of the soldiers. Certainly it was not the intention of the Government, or of any of the officers in charge of any of its departments, that this vast multitude of worthy people should be so restrained, and that the reward should be given to those only who were disposed to defy the power of the Government and to ignore its rulings and commands.

The question involved in this case was incidentally before this Court in the case of Black *v.* Jackson, October Term, 1899, 177 U. S., 349. The precise point involved

here was not directly passed upon by the Court, because it had not been disposed of or considered by the Supreme Court of the Territory. The effect of the decision, however, we think is sufficient to dispose of the case at bar. In that action, a demurrer was sustained to an answer setting up the same facts that are set forth in the amended petition of the plaintiff in error herein. The defendant refused to further plead and stood upon the answer. The cause was dismissed and proceedings in error taken to the Supreme Court of the Territory. The action of the trial court in sustaining the demurrer was upheld, and the case came before this Court on appeal. The Court held that the title to the land was involved in the action, and that the answer stated a defense; that the demurrer should have been overruled, and the defendant permitted to make proof of his allegations. The discussion of the case related only to the points which had been determined in the Supreme Court of the Territory of Oklahoma, but the overruling of the demurrer was in effect a declaration that the answer, upon its face, was sufficient. All that would remain would be the proof of the allegations of the answer and the relief resulting therefrom. If no defense was set forth in the answer, there was nothing to prove to either the Court or jury, and it became immaterial what was done or demanded with reference to a jury trial. The jury was to try the issues, and if the answer stated no defense, there was no issue for the jury, and the Court must have been held to have disposed properly of the case as presenting only an issue of law upon the demurrer.

The reservation in that case was the Chilocco Indian School Reservation, but we conceive no difference can exist between the two, except that the records of the department showed that, on the morning before the opening, the Commissioner of the General Land Office directed that a one

hundred foot reservation be placed around and south of this reservation. It can hardly be claimed, we think, that any authority existed in any department of the Government to change the act and the proclamation, and we submit that that part of the decision, in the case of Brady *v.* Williams, is a correct interpretation of the law.

All that is contended by plaintiff in error with reference to what was meant in the Act and the Proclamation by the term "the country known as the Cherokee Outlet," is conceded by the Honorable Secretary of the Interior in Brady *v.* Williams, 25 L. D., 55, and we think that all the contention on behalf of the defendant in error must reduce itself to this admission, and from that point show some excuse, if any there be, why the declaration of Congress and the President of the United States, positively fixing the probibitory line "around the entire tract of country known as the Cherokee Outlet," and describing that country as being bounded on the east by the ninety-sixth degree of west longitude, on the north by the State of Kansas, etc., should be overthrown on the 24th of July, 1897, by the declaration of the Honorable Secretary of the Interior that the Act and Proclamation "did not apply to the whole of said outlet." That portion of the case last cited, with reference to this point is as follows:

"The prohibitory provisions of the statute opening to settlement the lands known as the 'Cherokee Outlet,' and the President's proclamation thereunder, did not apply to the whole of said Outlet, but only to such portion thereof as should be declared open to settlement under said proclamation, and hence are not applicable to Indian reservations within said Outlet excluded from settlement, but adjacent to the lands opened under said proclamation."

It has been said that "'Thou shalt', and 'thou shalt not', is carved into the very nature of things." How the com-

mand of Congress and of the President that "Thou shalt not enter upon any portion of the tract of country known as the Cherokee Outlet, except a one hundred foot reservation around and immediately within the outer boundaries thereof" can co-exist with the declaration of the Secretary that "Thou shalt be permitted to enter upon all portions of the country known as the Cherokee Outlet, except such portions as are actually opened to homestead settlement," we submit, is more than can be reconciled. A comparison of the grounds of the two conflicting constructions, we think, is sufficient to warrant the action of the President, the Secretary of the Interior, the Secretary of War, the Commissioner of the General Land Office, the agents of the Government, as well as its soldiers, the lawyers of the country and 150,000 intelligent and law-abiding people, in holding that the command of Congress and the warning of the President, which was then before the settlers for their guidance, constituted the enduring truth carved into the nature of the contest for homes in this new country.

Whatever has been said prior to the language last quoted has been reduced and enforced by argument and consideration until the Honorable Secretary was brought to the ultimate proposition on behalf of those who defied the Act of Congress and the Proclamation of the President, and forced to admit that the language of Congress and of the President with reference to what constituted the country known as the Cherokee Outlet, referred to all that country. If this be conceded, we have no disposition to offer argument to convince the Court that the command ought to be respected, at least in favor of those who acted upon it and who have expended their labor and substance through all these years in improving their homes, and in the contention that Congress and the President meant what they said; that, when they were forced to remain upon the outer boundaries of

this country by the bayonets of the soldiers of the United States, they were not being unfairly held back by such force, while others with less regard for the laws and commands of the Government were gaining an advantage over them which was inequitable and unjust to the last degree.

There is nowhere in the Act of Congress or in the warning of the President in the Proclamation, any language that can be construed into referring to what was prohibited, that does not refer positively and specifically to the entire tract of country known as the Cherokee Outlet, and, in addition thereto, they render certainty more unmistakable by defining by metes and bounds what was to be understood as, and taken to be, the Cherokee Outlet for the purposes of the Act.

The contention that only the lands opened to settlement were to be considered within the prohibited district was presented to this Court in Smith *v.* Townsend, 148 U. S., 490. It is immaterial whether the reservations within the single tract of country bounded by this line of prohibition were few or many, large or small. Few were mentioned in the act opening Old Oklahoma to settlement, but they were sufficient in number and importance to give rise to the identical contention which is now again before the court.

The meaning of the act under consideration in Smith *v.* Townsend was not so clear and positive as the one under consideration in the present case, and the definiteness and certainty of the later act was doubtless induced by controversies over the previous legislation. In the case last referred to, Mr. Justice Brewer, after discussing the nature of the title held by the railroad company to its right of way, declares the nature of the title to be immaterial, and uses the following language:

" But whether this be so or not, it is enough that in the cession, in the acts of Congress, and in the proclamation of

the President the land was dealt with as an entirety, with certain metes and bounds, and it is that body of lands, thus bounded, which all parties were forbidden to enter upon who desired thereafter to enter any portion as a homestead. The evident intent of Congress was, by this legislation, to put a wall around this entire territory, and disqualify from the right to acquire, under the homestead laws, any tract within its limits, everyone who was not outside of that wall on April 22. When the hour came the wall was thrown down, and it was a race between all outside for the various tracts they might desire to take to themselves as homestead."

By the legislation under consideration in the present case, this "wall" is so definitely and certainly fixed that any one who can read can understand it, and it is a well-known fact that practically every person throughout the country, and especially in the vicinity of the lands in question, did understand it, and this general understanding and application of the law furnishes the convincing argument that its meaning was not obscure, and becomes the positive and certain meaning of the law under the rule of contemporaneous construction, even though there was positive uncertainty in the language in question.

There were hundreds of reservations in the Cherokee Outlet. Some of them amounted to no more than two acres, for the purposes of Government land offices. Others amounted to thousands of acres, and were held from settlement by reason of the rights of the Indians, and a great many, sometimes amounting to only a section or less, were reserved for the benefit of the schools and as Indian allotments. The saline reservations covered thousands of acres, and were never fully and completely granted to the Cherokees, but under the Cherokee Treaty the Government reserved the right to permit other Indians to take salt from those reservations, and to use them in common with the

Cherokees for that purpose. One of these reservations adjoins the State of Kansas on the north of the Outlet, and extends nearly four miles south, a little deeper into the Cherokee Outlet than the Chilocco School Reservation. If reserving land from homestead settlement within the Outlet placed it outside of the prohibited district, then there was no "tract of country" opened to settlement or referred to, and the admission that these principal reservations were within the country known as the Cherokee Outlet we consider virtually an admission that there is no foundation for the contention that the line of prohibition was not around all the reservations alike, or that all were alike opened to occupancy prior to the opening of the homestead lands to settlement. We file and submit with this brief a large map, showing all reservations within the Cherokee Outlet, except the reservation of sixty feet for public roads, which would, of course, connect all other reservations and make every parcel of land opened to settlement accessible, without actually going upon any of the homestead lands. Without resorting to these road reservations, almost all the homestead lands in Pawnee County might be reached by crossing over Indian reservations, "allotments." The rule that only homestead lands were within the line of prohibition leads back to the very contention that was urged in Smith *v.* Townsend. The fact that the act then under consideration, in the prohibitory clause, used the words "enter upon and occupy," furnished some shadow of excuse for the contention in that case, but the language is changed in the present act to read "enter upon or occupy," so that is made certain by the language of the act which required a decision of the court to render positive in the former act.

All the precautions of the Government in the location of booths and the issuance of certificates, and the requirements in that regard, as well as detailing soldiers to guard the

borders of the country, would have been wholly useless, if there was not an outer boundary to some entire tract of country to be guarded and protected. All the soldiers under the command of the United States at the time could not have guarded all the borders to all these reservations and pieces of country opened to settlement and occupancy, if persons had the right to collect upon the borders of any piece of homestead land that they might desire.

Fairness and exact justice between all the contestants for homes was the first consideration of Congress and the President. The object was practically accomplished by the construction of the law which prevailed for more than three years. It is believed there can be neither reason or justice in the new contention.

Respectfully submitted,

S. H. HARRIS,
Attorney for Appellant.
J. J. DARLINGTON,
Of Counsel.

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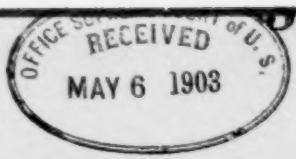

IN THE

Supreme Court

Of the United States.

OCTOBER TERM, 1902.

ROBERT L. WINEBRENNER, *Appellant.*

vs.

EDWARD C. FORNEY, *Appellee.*

No. 409.

PETITION FOR RE-HEARING.

S. H. HARRIS,
J. J. DARLINGTON,
Counsel for Appellant.

PERRY REPUBLICAN PRINT, PERRY, O. T.

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The Appellant in the above entitled cause respectfully petitions this honorable court to withhold and stay the mandate of the court herein, and to grant him a re-hearing of the said cause, and a reversal of the opinion and decision of the court rendered and delivered herein on the 6th day of April, 1903, for the following reasons:

1st. That the court overlooked and ignored the

importance and controling force of the rule of contemporaneous construction of the act and proclamation involved in this cause.

2nd. That the court misconstrued the proclamation of the President, opening the lands in the Cherokee Outlet to settlement, and misconstrued and misapplied the act of congress making provisions for said opening.

3rd. That the court erred in making a distinction between such portions of said Outlet as were reserved from settlement and from which "sooners" entered upon the race and other reservations adjoining the outer boundaries of said country, of the same class and character.

4th. That the court erred in holding and deciding that "the entire tract of country, to be opened to settlement under this proclamation" was other than the said Cherokee Outlet, as described and defined in the session, the act of congress and the said proclamation of the President opening the lands to settlement.

5th. That the court erred in holding and deciding that the first paragraph of that portion of the proclamation defining and locating the one hundred foot strip was in conflict with the second paragraph, and that the said first paragraph was controlling.

6th. That the court erred in holding that there

was any "entire tract of country" except the said Cherokee Outlet, and as defined by said session, act of congress and proclamation.

7th. That the court erred in holding that it would be more equitable to suppose that the President intended to place the one hundred foot reservation along the western boundary of the Ponca Reservation, on account of the great multitude of people who desired to make the race, in face of the conceded and established fact that such persons were not permitted, either by the Secretary of War, the Secretary of the Interior, the Commissioner of the General Land Office or the officers directly in charge of the opening, to make entry from that point.

In support of the foregoing petition and motion counsel for Appellant respectfully submit the accompanying brief and suggestions.

The undersigned counsel for Appellant in the cause herein-before entitled hereby certify that in their opinion the grounds set forth in the foregoing petition for re-hearing are valid and sufficient to justify and require such re-hearing.

S. H. HARRIS,
J. J. DARLINGTON,
Counsel for Appellant.

BRIEF.

1st. If we admit that there is a conflict or uncertainty in the proclamation with reference to the location of a one hundred foot strip around the country to be opened to settlement, we suggest that the adoption of an equitable rule of construction by the executive departments of the United States in applying the commands and directions of the President would be highly proper, and that is what all the officers of the government having anything to do with the matter, pretended and attempted to do. This construction prevented all persons who were disposed to respect the lawfully constituted authority of the United States from entering from the Indian Reservations in question. The construction of the law before and at the time of the race for homes was widely published and universally understood, and it has been conceded at all stages of the litigation that more than nine hundred and ninety-nine per cent of those desiring lands respected and obeyed the law as construed by the officers of the government whose duty it was to then make application of it. We respectfully submit that to determine an equitable rule as laid down by the court in the opinion, without regard to this contemporaneous construction, and almost ten years after the time when these home

seekers could have the benefits of an application of such rule, not only denies to the Appellant and others who, like him, respected the law, an equal right to acquire a home, but denies to the Appellee the lands, enriched by ten years of labor and improvement. We know of no other instance where this government has visited such penalties upon those of its citizens who respected its laws as construed by its officers charged with that duty.

As to the rule of contemporaneous construction see authorities cited in original briefs.

2nd. We submit that there is no conflict in the proclamation, and if such conflict existed the second clause, which is evidently explanatory of the first, would be controlling.

If all provisions in reference to the one hundred foot reservation were omitted from the proclamation, there would be no difficulty in determining the "tract of country" opened to settlement. It is positively and definitely described in the session, the act of congress, and the proclamation, which reiterates the description. The exception of certain reservations would not change the general description of the entire tract, and if all these reservations were not within the entire tract *what cause or reason would there be for excepting them?* The one hundred feet were opened in advance for the sole purpose of allowing

persons to congregate upon the borders of the country. It did not change those borders or pretend to do so. It should be construed in the light of its evident purpose. That parts of such strip might be inaccessible could not change its location. A great portion of it would be inaccessible wherever located. It was around the entire tract of country to be opened to settlement. That tract of country was all the lands ceded by the Cherokee Nation of Indians and by act of congress declared to be the country *commonly known and called the "Cherokee Outlet."* An inspection of the map filed in the case will show that there could be no other "entire tract of country." If we consider the entire tract of country as that portion of the Outlet actually opened to homestead settlement, or the remainder of the Cherokee Outlet as diminished by reservations and exceptions, then there are several entire tracts which are entirely surrounded by reservations such as Indian allottments, which are not only reserved for the use of, but the title to which is absolutely vested in the Indians. It seems that no such construction could be based upon anything but a direct or inferential distinction between the various reservations within the Cherokee Outlet or the "entire tract of country opened to settlement."

3rd. The pen map of the Cherokee Outlet

which is made part of the decision complained of designates five certain reservations as not being within the country opened to settlement. This leaves more than one hundred other reservations, many of them of the same class and character of title, bordering upon the outer boundaries of the lands designated upon this pen map as the "lands opened to settlement." The reservations designated on the pen map are those from which persons made the run for lands, despite the efforts of the soldiers, under direction of the Secretary of the Interior to keep them out. *If persons had made the run from any of the other border reservations, for instance the Saline Reservation, the College or School Reservations or the Pawnee Allottments*, why could not the map be made to exclude them from the "lands opened to settlement?" And again, if no persons had succeeded in evading the search of the soldier upon the five reservations now designated upon the pen map, what would there be in the session, the act of congress or the proclamation to justify their exclusion from the "entire tract of country to be opened to settlement?" The proclamation does not pretend to make any distinction, and the nature and purpose of the various reservations, and the character of the title by which they are held does not appear to justify it. If it be said that all reservations were excluded from the "entire tract of couutry to be opened to settlement,"

it will be readily seen that there are various tracts of homestead lands entirely surrounded by reservations, and instead of there being an opening of one entire tract of country there would be an opening of several small tracts and the one hundred foot reservation would be around each and all of these various tracts. In no other way could the one hundred foot reservation be placed directly contiguous to the homestead lands. If we include in the reservations those of sixty feet along every section line, for purposes of public roads, then the one hundred foot boundary would be around every section of land in the Cherokee Outlet.

The majority of the court appear to be of the opinion that by placing the one hundred foot reservation where it is contended for by Appellee that it would be contiguous to the homestead lands on all sides, but this would be to place more than two-thirds of the strip along the main channel of a large river, and make it entirely inaccessible and more than one-half of the remainder would be many miles from the homestead lands by reason of the Indian allottments and other reservations immediately within the boundaries of what is designated upon the pen map as the lands opened to settlement.

The same suggestions apply to the statement of the court that the one hundred foot strip, if placed where it is contended by Appellee that it should be,

would be public lands, while to place it at the ninety-sixth degree would be putting it upon an Indian Reservation. A consideration of the map will show that there would be almost, if not quite, as many miles of this strip upon Indian allottments which are held by a higher class of title than the reservations designated upon the pen map. In fact the Indians have no title to the Chilocco School Reserve, while all allotments are held by patent from the United States, with only a restriction upon the power to sell and convey.

The session and act of congress describe the lands to be opened to settlement by meets and bounds, and the proclamation, after setting forth the same description and designation, declares that *all of said lands* shall be opened to settlement, save and except several hundred reservations, some bordering on the outer boundary of the main tract and others in the interior thereof. If we ignore this as being the description of the lands opened to settlement, and also referred to as the country known as the Cherokee Outlet, we set aside a plain and unmistakable guide as to what is referred to in the proclamation as the Cherokee Outlet and the "entire tract of country to be opened to settlement under this proclamation," and attempt to substitute speculation or supposition in lieu of certainty.

Under almost an identical state of facts, this

court, in Smith vs. Townsend, declared that it was evidently the intention to deal with the tract of country as an entirety, and we think that the language of the session, the act of congress, and the proclamation of the President did deal with the Cherokee Outlet as an entirety, and the officers of the government in all departments so understood and construed the law and compelled Appellant and many thousands of other home seekers to comply with that construction.

The congress and President were not so much concerned about the distance that any person might have to run to reach the land desired as to secure absolute fairness in the great race and a universal understanding of the manner of securing a home in compliance with the law, and even if the construction of the law at that time enforced had not been fully warranted by the language thereof, that construction could not afterward be changed without doing violence to the rights of every one of the hundred thousand or more who observed it, and thereby fixing a reward upon the defiance of the law and the constituted authority of the government by the very few who receive the benefits of the new construction.

We think this court was misled by the pen map contained in the opinion of the Supreme Court of the Territory, and that a more careful consideration will convince the court that the "entire tract of country to

be opened to settlement" and the "country known as the Cherokee Outlet" are one and the same. That entry upon any part thereof was prohibited by the act of 1889 and 1893. That all of that entire tract was dealt with and declared open to settlement, and that all lands within the outer boundaries thereof which were not to be occupied for homestead purposes were excepted in the proclamation, regardless of the character of title or the purpose for which reserved, or whether such exceptions referred to large or small tracts of land. That the proclamation warned all persons of the prohibition against entering thereon, and then, on account of the fact that lands adjoining the outer boundaries of the Cherokee Outlet were, in some instances, owned by individuals who might sell special privileges to homeseekers able to buy the same, permission was given to enter upon any part of the Cherokee Outlet to the extent of one hundred feet and no more. Such was the construction of the law by those in authority at the time it was passed, and who framed the very language they were called upon to construe, which construction was enforced by the soldiers of the United States until all that could be lost or gained by that construction had been suffered or acquired. It was a question of a fair race for a home, and when the race is over the awards should be in accordance with the rules of the race. To change the rules which governed this great struggle for a

home long after the race was ended, and to take from those who had fairly won under the rules then enforced, not only their lands but years of labor and thousands in money expended in improvements merely because a different rule now appears to be more equitable, is to sacrifice all the fruits and purposes of equity to the shadow of its name.

To briefly recapitulate we suggest that in case of doubt as to the construction of the law in the case, the rule of contemporaneous construction should be controlling, and the present case calls for the application of the rule.

The pen map is based upon a supposed distinction between reservations within the Cherokee Outlet or the "entire tract of country opened to settlement."

Such reservations are all of the same class, and are all excepted from an entire tract or body of land because they are all included within the outer boundaries of that tract as defined and set forth in the session, the act of congress, and the proclamation of the President.

The majority of the court determines a supposed boundary to the entire tract dealt with by process of construction or supposition as to the intention of the President, and disregard a plain and specific boundary description.

The court assumes that the one hundred foot reservation was not at the eastern boundary of the Cherokee Outlet because it would be on an Indian reservation, and that it is where Appellee contends that it is because it would be contiguous to the homestead lands, when in fact the supposition places a large portion of the hundred foot strip in the middle of a large river and the greater portion of the remainder upon Indian allotments many miles from homestead lands.

The court, in effect, holds that it would be equitable to construe the law as contended for by Appellee, but overlooks the fact that the fruits of the rule would be most inequitable applied and bestowed, since the close of the race put an end to the power of Appellant to avail himself of such a rule.

The court supposes a tract of country opened to settlement different from the tract of country declared to be opened, and defined in the session, the act of congress, and, by reference, in the proclamation itself.

All that is said by the court with reference to the supposition that the President did not intend to set apart a one hundred foot reservation on the Indian Reservation applies with equal force to the Indian allotments of the Pawnees and others upon which the one hundred foot strip would be if the supposition is

upheld.

The court sees in the language in reference to the one hundred foot strip being around and immediately within the outer boundaries of the entire tract to be opened to settlement a purpose to prevent any one from going upon a reservation for school or county purposes, but there is no more reason why a permission should be read into the act and proclamation to go upon an Indian Reservation, a Saline Reservation or an Indian allotment. It must have been the intention to have a straight line upon a definite boundary.

The Chilocco Reservation and the other Indian Reservations west of the river were even included in the Perry Land District. We are at a loss to understand why part of the reservations within the defined outer boundaries of the main tract opened to settlement are to be considered outside thereof for the purpose of determining the point of starting on the race and others of the same class and character, reserved from settlement in the same language and manner, are to be considered therein. The court must have been misled by the pen map set out in the opinion of the Supreme Court of the Territory.

The court is in error about there being one or two contradictory orders sent out about the time of opening the country in reference to the outer boundaries. There are scores of letters and telegrams, as appears

from the records in the land department, and many of them are referred to in the case of Cagle vs. Mendenhall. The orders were all to the same effect, and all directed that persons would not be allowed to enter from an Indian Reservation. The soldiers, as appears from the official report of the Secretary of War, removed all persons from the borders of these reservations on the west. These matters are universally known, and this court should take judicial knowledge of these facts, under authority of Smith vs. Townsend, 148 U. S., 490.

It is true that parties who made the race from the reservations were not allowed a hearing upon the question of the proper starting point, but these parties had not made the race at the time the opinion of the Secretary of War, the Secretary of the Interior, the Commissioner of the General Land Office and the Assistant Attorney General in charge of the question, as well as the local officers in charge of the opening, were made public. The rights of the parties relates back to the beginning. All parties were fully aware of the act and proclamation as well as the opinions of the officers of the government in reference to the proper construction thereof. To disregard the orders of the officers in charge of the opening, which orders were made pursuant to the contemporaneous construction of the law by all officers whose duty it was to construe it, meant to lose the homestead right, but

for the accident of a successor in the office of Secretary of the Interior who might entertain different views as to the meaning of the men who had construed their own language.

Again, if it is to be said that the President could not have intended to place the one hundred foot strip along the outer boundaries of the country known as the Cherokee Outlet because it can not be presumed that he intended to give permission to go upon an Indian Reservation, why shall this benefit the Appellee, who did not go upon the one hundred foot strip at all, but upon an Indian Reservation? The President did not give permission to go upon all of the Indian Reservations. If it can not be presumed that he would permit a trespass upon a strip one hundred feet in width upon an Indian Reservation it certainly can not be claimed that the failure to give such a limited permission amounts to an unlimited permission to go upon the entire reservations. The record of this case shows that Appellee did not claim to have started from a one hundred foot strip, but from the reservation itself. The Prohibition against going upon any part of the lands in the Cherokee Outlet is contained in the act of congress, and the permission of the President was to go upon a oue hundred foot strip *somewhere*. Wherever the one hundred foot strip was located the Appellee was disqualified under the plain letter of the law, as well as the spirit and purpose

thereof, because he was upon prohibited territory for the purpose of gaining an advantage, and whatever his reason might have been for not occupying the reservation of one hundred feet, even if it was located as the court has found, it is sufficient that he failed, at the time of opening the country to settlement, to possess one of the qualifications of a homestead settler.

See Smith vs. Townsend, 148 U. S. 490.

All persons interested in this litigation are those who have resided upon and cultivated and improved these lands since the opening of the Cherokee Outlet to settlement, September 16th, 1893. It is not a question of "claim jumping" or speculation. Appellant and his associates in this litigation have expended their labor and money in the improvement of their homes, believing that the government would not finally disown them for having respected and complied wish its laws, as construed by its executive department and enforced by its soldiers. Still believing that our cause is just, and earnestly praying that a re-hearing of the above cause may be had, the foregoing suggestions are,

Very respectfully submitted,

S. H. HARRIS,

J. J. DARLINGTON,

Counsel for Appellant.

In The
Supreme Court of the United States.

OCTOBER TERM. 1902.

ROBT. L. WINEBRENNER,
Plaintiff in Error.
vs.
EDWARD C. FORNEY,
Defendant in Error.

Cause No. 409.

BRIEF OF DEFENDANT IN ERROR ON MERITS.

STATEMENT.

On September 23d, 1893, Edward C. Forney made homestead entry at the Perry, Oklahoma land office on the land in controversy. On October 7th 1893, Robert L. Winebrenner filed contest against the entry of Forney, alleging that Forney was disqualified, because he entered the race into the Cherokee Outlet on September 16th 1893, from the Ponca Indian reservation in

Oklahoma Territory. This contest was waged through the Land Department until it was finally determined by the Secretary of the Interior who decided the case in favor of Forney and held that Forney was not disqualified to enter this land because he made the run on the opening day from the Ponca Indian Reservation, and the land was awarded to Forney, who complied with the homestead law, made final proof under his entry and received patent for the land.

On September 26th, 1900, Robert L. Winebrenner commenced this action against Edward C. Forney in the District Court of Kay County, Oklahoma Territory, to recover the land and to obtain a decree that Forney held the land in trust for Winebrenner on the ground that the Secretary of the Interior had erred in matter of law in holding that Forney's run from the Ponca Reservation was legal. A second amended petition was afterward filed to which a general demurrer was interposed and sustained, and Winebrenner's cause dismissed. On appeal to the Supreme Court of Oklahoma this decree was was affirmed, and from this judgment plaintiff again appeals to this court.

ARGUMENT.

The demurrer to the second amended petition which was sustained by the trial court and by the Supreme Court of Oklama is in three paragraphs, and under it we presented there, and desire to present here, one question, that is:

we affirm that the petition does not contain a sufficient statement of facts to constitute a cause of action by the plaintiff against this defendant, or to entitle the plaintiff to the relief prayed for. This involves but one point and that is, that the defendant, Edward C. Forney, was not disqualified to make homstead entry on the land described in the amended petition, because of the fact that he entered Cherokee Outlet on September 16, 1893, from the Ponca Indian Reservation.

The contention of the plaintiff is that the Ponca Indian Reservation was a part of the Cherokee Outlet, and that Edward C. Forney, at 12 o'clock, noon, central standard time, September 16, 1893, being within the Ponca Indian Reservation, was in the country known as the Cherokee Outlet, and which was then about to be opened to settlement. Our contention is that Edward C. Forney was in a place where he had a right to be and was not violating any provision of the President's Proclamation opening the Cherokee Outlet to settlement.

The provisions of the President's Proclamtion making regulations on the subject are as follows:

"Said land is to be opened as herein proclaimed, shall be entered and occupied only in the manner and under the provisions following, to-wit: A strip of land one hundred feet in width, around and immediately within the outer boundaries of the entire tract of country to be opened to settlement under this proclamation,

is hereby temporarily set apart for the following purposes and uses, viz: Said strip, the inner boundary of which shall be one hundred feet from the exterior boundary of the country known as the Cherokee Outlet, shall be open to occupancy in advance of the day and hour named for the opening of said country, by persons expecting and intending to make settlement pursuant to this proclamation. *Such occupancy shall not be regarded as trespass, or in violation of this proclamation, or of the law under which it is made, nor shall any settlement rights be gained thereby.*"

Now, if Edward C. Forney is disqualified, it must be because he has violated this language just quoted from the President's Proclamation, and if he occupied land which the President's Proclamation did not prohibit him from occupying, then he is not disqualified. If Edward C. Forney started into the Cherokee Outlet on September 16, 1893, after 12 o'clock noon from the one hundred foot strip, or from a further distance from the lands, then being open to settlement, he is not disqualified.

The Interior department find that he entered from the Ponca Reservation and that he did not enter the Cherokee Outlet, the territory opened to settlement, until the time stated in the President's Proclamation. So that the one question is, was the one hundred foot strip along the east side of the Cherokee Outlet which opened to settlement on September 16, 1893, or was the one hundred foot strip on the 96th meridain? The President's Proclamation, it seems to us,

answers this question, for its language is quite clear. And where the language of an Act is clear it needs no construction.

In the case of *Yerk* v. *The United States*, 173 U. S., 439, Mr. Justice McKenna, speaking for the Supreme Court, said:

"The answer is ready and may be brief. The Act of 1891 is not ambiguous. Its clearness does not need and may not be construed by analogies from other statutes or from the practice under other statutes. The rule is elemental that language which is clear needs no construction."

Now, the language of this provision of the Proclamation is clear. It would indeed seem that the President of the United States and his cabinet officers would not present language declaring a rule of action for the common people of the country to pursue when taking for themselves homesteads that were given of the bounty of the Government, other than in clear terms.

Therefore the President said that they might make the start into this country from a "strip of land one hundred feet in width around and immediately within the outer boundaries of the entire tract of country to be opened to settlement under this proclamation." What need of construction for such language? It is a strip of land one hundred feet in width and that strip of land is located "around." That means entirely around, not partly around, but completely around; and that strip of land is located "immediately within the outer boundaries of the en-

tire tract of country to be opened to settlement" not on a part of the outer boundary of the entire tract of country, but around and immediately within the outer boundaries of the entire tract of country to be opened to settlement. Where then, would this strip of land be with reference to the Ponca Indian Reservation? It was the "country known as the Cherokee Outlet" that was being opened to settlement. If all of the lands west of the 96th meridian were being opened to settlement, then of course the line on the east of the coverted lands was somewhere east of the Ponca Indian Reservation. But if the country "known as the Cherokee Outlet when the President made the Proclamation in August, 1893 was being opened to settlement, then that east one hundred foot strip was on the eastern boundary of the country "known as the Cherokee Outlet" and the Ponca Indian Reservation being east of that country "known as the Cherokee Outlet" was not within the prohibited district.

Again; this one hundred foot strip was within the outer boundaries; not an inner or sub-boundary, but within the outer boundaries of an "entire tract of country" that was being opened to settlement. Now, was the entire tract of country west of the 96th meridian being opened to settlement? If so, some bright homesteaders made an awful mistake on September 16, 1893, in not settling upon the magnificent bottoms along the Salt Fork, Red Rock and Bear Creek streams in the Ponca, Otoe and Missouri Reser-

vations and a like mistake was made in not settling upon lands of the Kaw and Osage Indians. If the Osage, Ponca, Otoe, Missouri and Kaw Reservations were not being opened to settlement on September 16, 1893, which of course they were not, then those Reservations constitute no part of the entire tract of country to be opened to settlement under this proclamation" of the President of August 19, 1893. For unless those Reservations were within the outer boundaries of an entire—not a separate, nor a divisible, but as the words say, "entire tract of country" that was then being opened to settlement on September 16, 1893, then they were not within the land which the President spoke of as "the country known as the Cherokee Outlet."

It is claimed by those who take the other side of the question from us that the latter portion of this part of the President's Proclamation, stating that said strip the inner boundary of which shall be one hundred feet from the exterior boundary of the country known as the Cherokee Outlet, states the place where this one hundred foot strip is, and puts that place, so far as the east line is concerned, upon the 96th meridian, which is the east line of the Osage Reservation. This construction cannot be maintained, never has been maintained or upheld by any judicial tribunal and never can be without violating the plainest canons of the construction of statutes. One of those rules of construction is that one section or part of a statute will not be so construed as to destroy another.

Mr. Justice Field, speaking for the Supreme Court of the United States in *Bernier* v. *Bernier* 147. U. S., 242, said:

"All Acts of the Legislature should be so constructed, if practicable, that one section will not defeat or destroy another, but explain and support it."

What becomes of the first portion of this provision of the President's Proclamation defining the one hundred foot strip if the construction of those persons who have been contesting legal homestead entries for the past nearly ten years is adopted? If the one hundred foot strip on the east line of the Cherokee Outlet is on the 96th meridian, how can it be "around and immediately within the outer boundaries of the entire tract of country to be opened to settlement?" If that one hundred foot strip was on the east line of the Osage Indian Reservation, then it was not around and immediately within the outer boundaries of an entire tract of country which was being opened to settlement, because the Osage, Ponca and the other Indian Reservations, except the Tonkawa and Pawnee Reservations, were not being opened to settlement. The country that was being opened to settlement was an entire, a whole, a complete tract of country, because the President said it was an entire tract of country, that was being opened to settlement. That was the kind of a country the President was talking about when he spoke of the "country known as the Cherokee Outlet." Our construction permits both of these declarations in this

proclamation to stand and harmonizes, one with the other. The construction of the plaintiff permits only the last portion to stand and wipes out and obliterates the first.

This latter rule this Court has said in the case just cited is not the rule to be followed in construing statutes.

In the case of *Smith* v. *Townsend*, 148 U. S., 490, the opinion in which is prepared by Mr. Justice Brewer, the Court, speaking from its former decision, says:

"Courts in construing a statute may with propriety recur to the history of the times when it was passed; and this is frequently necessary in order to ascertain the reasons as well as the meaning of the particular provisions in it."

The Court in the same opinion says that one of the questions to be asked and answered in finding the true interpretation of statutes is:

"What was the mischief and defect for which the common law did not provide?"

All of these rules which we have and will refer to are of course equally applicable to a President's Proclamation, for it is a declaration which has the force and effect of a statute and should be considered in the same way.

What, then does the history of the time tell us was the defect in existing legislation which caused the President to provide for this one hundred foot strip "immediately within the outer boundaries of the entire tract of country to be opened to settlement" on September 16, 1893? It was that on the northern, the southern, the

western and the eastern sides of this "entire tract of country" there was land in the possession and under the control of other peoples and tribes of people than those who were about to enter the coveted country. The right of possession of the farms on the north, the south and the west of this country being opened to settlement, was in individuals who had an ownership therein and the exclusive right of possession thereof. On the eastern side there were Indian Reservations to cross which it was in no wise unlawful, but to remain in which was not permitted except by order of the executive department. The President of the United States saw that unless provision was made whereby the intending settlers could locate immediately upon the border of the land that was being opened to settlement, a large price would probably be charged for the right to remain for some period of time immediately before the opening upon adjacent land. And the desire of the President being one that was to benefit the intending homestead settler and to make his path as easy as possible and surround with as little difficulty as was consistent with a strict enforcement of the policy of Congress and of the administration and give every man an equal show to enter this coveted country from any and all sides, bounds and corners, declared that there shall be a one hundred foot strip "immediately within the outer boundaries of the entire tract of country to be opened to settlement."

In view of this purpose of the President and

in the light of the history of the time, it would be absurd to say that the President was promoting this purpose and desire by placing the one hundred foot strip on the east line of a tract of country from twelve to fifty miles from the tract of country to be opened to settlement. If this one hundred foot strip was on the 96th meridian, then it was twelve miles east of the land to be opened to settlement on the south end of that line, and fifty miles from the same land at the north end of it. And the settler standing on that one hundred foot strip at 12 o'clock noon, September 16, 1893, would have been twelve to fifty miles, and some places more on account of the bend in the Arkansas river and on account of the Ponca and the Otoe Reservations extending west of the river, to run in order to get upon the outer boundary "of the entire tract of country" that was then being opened to settlement. Such a construction makes the declaration of the President absurd, and it is a canon of construction that statutes and constitutions, will be so construed as to avoid absurd conclusions.

In the case of *LAW OW-BEW* v. *U.S.*, 144 U. S., 47-59, Mr. Chief Justice Fuller, speaking for the Court, said:

"Nothing is better settled than that statutes should receive a sensible construction, such as will effectuate the legislative intention, and if possible, so as to avoid an unjust or absurd conclusion."

In the case of *Bernier* v. *Bernier*, *supra*, the rule was also declared.

"When a provision admits of more than one construction, that one will be adopted which best serves to carry out the purposes of the Act."

So if it were conceded that there is an ambiguity in the two portions of the declaration of the President referred to in this Proclamation, a thing we do not believe to be true, yet we say if so, then they must be construed by reading the two proviiions together and so that an absurd conclusion will not be reached by the construction and that construction adopted which will best promote the purpose of the Act. The purposes of the act being to permit intending settlers to locate themselves "around and immediately within the outer bonndaries of the entire tract of country to be opened to settlement" so that no person, tribe, or officer could say to such intending settlers, "You are now trespassing upon my land; you must vacate this land or pay my price for the use and occupancy thereof." Would the purpose of the President to avoid any such situation have been promoted by placing the one hundred foot strip on the east line of the Osage Reservation? That Reservation was not bing opened to settlement. That Reservation belonged then and now to an Indian tribe; to a people who owned their lands in common, and they had no interest in the settlement of the homesteader on the Cherokee Outlet. Why should the President say that they must give up

the possession of a part of that Reservation for a period from August 19, 1893, to September 16, 1893, in favor of the homestead settlers? The settlers had the right to go on the one hundred foot strip, wherever it was located, immediately after the President's Proclamation and to remain thereon until September 16, 1893. To locate that one hundred foot strip on the Osage Reservation means to take away some right of those Indians. To locate that strip where we claim the President located it took away no right of any Indians. To locate that strip where the opposition claim it is located, placed it at a point where no one of the many thousands of settlers whom the President supposed would desire to use it, would occupy it unless he be a fool. To place it where we say the President located it placed it where hundreds, aye, thousands of intending settlers would probably occupy it and the pathway to a homestead was made easier by its provisions. Furthermore, to place the one hundred foot strip on the east line of the Osage Reservation, placed it where the President, by the Act of March 3, 1893, was given by Congress no authority to place that strip, because that Act does not authorize him to regulate the opening of the Cherokee Outlet by placing the settlers in an occupancy of the lands of other people. The Osage people own their lands and while the President has no authority and guardianship over the Indians, he has no authority to take away the occupancy of those Indians of any of their lands without compensation. Why,

then, would the President, intending to benefit the settlers and to injure no one, take a hundred foot strip sixty miles long from the Osage Indians for twenty-eight days when it would prove a man an idiot to occupy the strip, provided at 12 o'clock noon, September 16, 1893, he desired to get a homestead on that day in the Cherokee Outlet.

Counsel for Plaintiff in Error in his brief below makes a point in the fact that the President in his Proclamation described all the lands west of the ninety-sixth meridian by metes and bounds and then proceeded to reserve the lands of the Osage, Kaw or Kansas, Otoe and Missouria and Ponca Indians from homestead settlement and thus seeks to support the argument that these lands were a part of "the entire tract of country to be opened to settlement," bnt were not opened because reserved from settlement in the Proclamation.

Let us answer this first by asking the question, whether these lands of these Indians so reserved from settlement by the President's Proclamation would have been opened to settlement on September 16, 1893, if the President had not declared the Reservation in the Proclamation? And if they would so have been opened to settlement if not reserved by the Proclamation, please answer under what authority or what Act of Congress they would have been opened to settlement?

In advance of the answer we put ourselves on record as saying that these lands would

not only not have been opened to settlement if the President had not reserved them from settlement in the Proclamation, but would not have been opened to settlement if the President had declared them open, because the President, like the people making entries of homesteads in the Cherokee Outlet on September 16, 1893, was a creature of the law, and that law gave him no authority or power to open these Indian lands to settlement. And whether he had reserved them from settlement or declared them subject to settlement, they would not have been open to entry, because it was not those lands that Congress had provided for being opened. But the President did not declare that these Indian Reservation lands were reserved from the Cherokee Outlet, but he did "declare and make known that all the lands acquired from the Cherokee Nation of Indians, the Tonkawa Tribe of Indians and the Pawnee Tribe of Indians by the three several agreements aforesaid will, at the hour of 12 o'clock noon," etc., be opened to settlement, save and except certain lands, etc. In other words the President was beginning with a tract that had been referred to as "Cherokee Outlet," a part of which had come to be "known as the Cherokee Outlet" and part of which had been acquired by treaty with the Tonkawa Tribe of Indians and by treaty with the Pawnee Tribe of Indians, and part of which had been ceded and conveyed to the Otoe and other tribes of Indians; and he was declaring that this tract of country, not called by him the "Cherokee Outlet," but

called by him "lands acquired from the Cherokee Nation of Indians, the Tonakawa Tribe of Indians and the Pawnee Tribe of Indians," and some of which belonged to some other Indians, and he was opening such portions of this tract, excepting those that he stated to the American people were not open. That is all there is to the argument that the Reservation, by the terms of the Proclamation, of these Indian lands from settlement, has to do with ascertaining where the one hundred foot strip is located around and within the outer boundaries of the entire tract of country to be opened to settlement, said tract being "the country known as the Cherokee Outlet."

Furthermore, Congress in referring to the lands which it was purchasing under the treaty with the Cherokee Indians, as the "Cherokee Outlet," did not thereby mean to be understood that it was purchasing from the Cherokee Indians all of these lands west of the 96th meridian, or that all of said lands were the lands called the "Cherokee Outlet" The ratification of the treaty with the Cheroeke Indians is contained in section 10 of this Act of March 3d, 1893. Section 11 of the same Act ratifies the treaty made for the purchase of the lands of the Tonkawa Indians, which lands comprised a part of these lands west of the 96th meridian, and section 12 ratifies the treaty for the purchase of the Pawnee lands, also a part of these lands west of the 96th meridian.

Congress certainly did not mean by this Act

that it was making a purchase of a part of these lands from three separate and distinct tribes of Indians. The fair construction of it is that it was purchasing the "Cherokee Outlet" as distinct from the lands of the other Indians, from the Cherokee Indians, and that it was purchasing also the lands of the Tonkawa and Pawnee tribes of Indians.

Congress did not mean to be understood as providing for the opening of all the lands of the old Cherokee Outlet in enacting the provisions of the Act of March 3, 1893, but it did mean that the Government, by the Act in ratifying the treaties with the Cherokee, Tonkawa and Pawnee Indians, was acquiring the absolute release from the Cherokee Nation of Indians of all of the lands claimed by said Cherokee Indians west of the 96th meridian and commonly known and called "Cherokee Outlet" and defined by executive order of August 10, 1869, but Congress did not mean that on March 3, 1893, those lands were "the country known as the Cherokee Outlet," for that was not true, for the Cherokee Outlet had been greatly diminished by the issuance of patents to the Osage Indians and the granting of title, qualified or absolute, to other tribes of Indians. This title of a part of this Old Cherokee Outlet, in Other Indians, is recognized in this very Act, for by it the title of the Tonkawa and Pawnee tribes of Indians was acquired by the Government.

The Cherokee Nation of Indians granted no more by the cession of its rights in and to the

lands covered by the Osage, Kaw, Ponca and other tribes of Indians than if it had been granted only its right and title to the lands of the Cherokee Outlet as it was known and commonly called on September 16, 1893, for the rights of the Cherokees had already been extinguished by treaty allowing friendly Indians to be located upon the old Cherokee Outlet. And with the exception that a mere precaution was being exercised in the full and repeated extinguishment of the Cherokee claim to the lands in the eastern portion of the old Cherokee Outlet, then occupied and belonging to other tribes of Indians, Congress, in Section 10 of the Act of March 3, 1893, was dealing with the land which was opened to settlement on September 16, 1893, excepting the seventy and one allotments taken out thereof. In the Act of March 3, 1893, it is said (*U. S. Stat. at Large*, Vol. 27, p. 642):

"And said lands, except the portion to be allotted as provided in said agreement, shall, upon the payment of two hundred and ninety-five thousand, seven hundred and thirty-six dollars, herein appropriated, to be immediately paid, become and be taken to be and treated as a part of the public domain."

Now, this language was used by Congress in referring to the land which Congress understood it was acquiring by the grant contained and provided for in the treaty with the Cherokee Indians which Congress was then approving. Congress then could not have considered the lands of that part of the old Cherokee Out-

let, which it had by regulation and treaty given and conveyed to the Osage, Ponca and other Indians, as being an integral part of the land which it was acquiring from the Cherokee Indians, for the words "and said lands" means of course all of said lands, and Congress was providing that those lands, "excepting the portion to be alloted as provided in said agreement," should, upon payment of the price to the Cherokee Indians, "become and be taken to be and treated as a part of the public domain." Was the Osage Reservation and the Ponca Reservation to become and be taken to be a part of the public domain? Certainly not. The entire Act evinces no such intention and the Government had by treaty long before vested in the Osage Indians a complete title as an Indian Tribe to the lands of its Reservation. So that the phrase "and said lands" means the lands of the Cherokee Outlet as the country was known after the passage of the Organic Act of Oklahoma, and those lands, excepting the lands to be allotted, were to become a part of the public domain when the Cherokee Indians were paid the sum of $295,736.

The same Section 10 of the same Congressional Enactment referred to the allotments which were provided for in the fifth section of the Cherokee agreement and those were the seventy Cherokee allotments and one allotment to D. W. Bushyhead also provided for. So that when Congress enacted that said lands, excepting the portions to be allotted as provided in said

agreement, it meant the lands, or at least the President understood in the Proclamation that it meant the lands "of the country known as the Cherokee Outlet," and it meant that said lands, excepting the seventy-one allotments provided for, were to become a part of the public domain when the Cherokee Indians were paid the price stipulated, and that land could not have included the lands of the old Cherokee Outlet that had been granted to the old tribes of Indians, because those lands could not become or be treated as part of the public domain and were therefore no part of the Cherokee Outlet that the President's Proclamation referred to.

Since the approval of the Organic Act of Oklahoma on May 2, 1890, the Cherokee Outlet has been only that part of the old Cherokee Outlet which was not made a part of the Territory of Oklahoma. In Section 1 of the Organic Act, Congress bounded Oklahoma Territory as follows:

"Commencing at a point where the 98th meridian crosses the Red river, thence by said meridian to the point where it crosses the Canadian river; thence along said river to the west side of the Seminole country, thence along said line to the north fork of the Canadian river, thence down said river to the west line of the Creek country, thence along said line to the northwest corner of the Creek country, thence along the north line of the Creek country to the ninety-sixth meridian, thence northward by said meridian to the southern boundary line of Kansas, thence west along said lands to the Arkan-

sas river, thence down said river to the north line of the land occupied by the Ponca tribe of Indians, from which point the line runs so as to include all the lands occupied by the Ponca, Tonkawa, Otoe and Missouri and Pawnee tribes of Indians until it strikes the south line of the Cherokee Outlet, which it follows westward to the east line of the State of Texas thence by the boundary line of the State of Texas to the point of beginning; the Public Land Strip which is included in said Territory of Oklahoma, is bounded east by the one hundredth meridian, south by Texas, west by New Mexico, north by Colorado and Kansas."

Congress then in the same Section said:

"Whenever the interest of the Cherokee Indians in the land known as the Cherokee Outlet shall have been extinguished and the President shall make Proclamation thereof, said Outlet shall thereupon and without further legislation become a part of the Territory of Oklahoma."

From this legislation it appears clearly that Congress has defined "the land known as the Cherokee Outlet" and that land is the remaining portion of the old "Cherokee Outlet', as before known and as quoted when referring to executive orders. The eastern portion of the old Cherokee Outlet was, after the passage of the Organic Act not a part of the Cherokee Outlet, but was a part and parcel of the Oklahoma Territory, expressly so declared by the Organic Act defining the boundaries of Oklahoma.

The Cherokee Outlet, as it formerly existed, was a part of the Indian Territory, and the part of the Indian Territory that was formed into

the Territory of Oklahoma was taken out of the Indian Territory and made the Territory of Oklahoma. Then Congress provided that whenever the interest of the Cherokee Indians in the land "known as the Cherokee Outlet" should be extinguished and the President should make Proclamation thereof, said Outlet should then, without further legislation, become a part of the Territory of Oklahoma, but that land which the plaintiff now claims was Cherokee Outlet on September 16, 1893, had already become a part of the Territory of Oklahoma, and if it had become a part, it certainly could not by Proclamation or otherwise thereafter become a part of the territory of which it was already a part. There was therefore a clear distinction between the lands which the plaintiff claims were a part of the Cherokee Outlet on September 16, 1893, and the "country known as the Cherokee Outlet."

The Supreme Court of the United States has, in our judgment, settled this question in the case of *U. S.* v. *Pridgeon*, 153. U. S., 48. The question there was whether, after the passage of the Organic Act of Oklahoma, Pridgeon could be prosecuted in Oklahoma Territory for larceny under the Act of February 15, 1888, prohibiting larceny in the Indian Territory. The Government claimed that the Cherokee Outlet was not a part of the Territory of Oklahoma but remained under the operation of the criminal laws provided by Congress for the Indian Territory and under the jurisdiction of those laws. The petitioner in this habeas corpus proceeding claimed that

after the passage of the Organic Act for Oklahoma the Cherokee Outlet was no longer under the jurisdiction of the Larceny Act provided for the Indian Territory The second proposition submitted by the Circuit Court of Appeals for the Sixth Circuit to the Supreme Court of the United States, was:

"Was the indictment against Pridgeon fatally defective on collateral attack by writ of habeas corpus in that it lays the venue of the offense 'at and within that part of the Territory of Oklahoma attached for judicial purposes to Logan county,' with a description of territory which includes part of Oklahoma and part of the Cherokee Cutlet not in Oklahoma, and avers the same to be 'then and there Indian country, and a place then and there under the sole and exclusive jurisdiction of the United States of America?'"

The Supreme Court in this case decided the question of the relation of the Cherokee Outlet to Oklahoma Territory squarely. The syllabus reads as follows:

"On November 12, 1890, in the Indian country, within the boundaries of Oklahoma Territory, as defined by Act of May 2, 1890, c. 182, 26 Sat. 81, horse stealing was not a crime against the United States, punishable under the Act of February 15, 1888, c. 10, 25 Stat. 33; but as to the Cherokee Outlet, it remained Indian country after the passage of the Act of May 2, 1890, and such an offense, committed there, continued to be an offense against the United States.

"An indictment in the District Court of the United States within and for Logan county in Oklahoma Territory, and for the Indian country

attached thereto, charging the commission of the offense of horse stealing in November, 1890, and laying the venue of the offense 'at and within that part of the Territory of Oklahoma attached for judicial purposes to Logan county," with a description of territory which included part of Oklahoma and part of the Cherokee Outlet not in Oklahoma, and which averred the same to be 'then and there Indian country,' and a place 'then and there under the sole and exclusive jurisdiction of the United States of America,' will not be held to be fatally defective when attacked collaterally by writ of habeas corpus."

The relation of the Cherokee Outlet to Oklahoma Territory and to the other portions of the old Indian Territory which had been carved out of that Territory were clearly defined by the Supreme Court in its opinion. It is there said:

"It is contended by the appellee that inasmuch as the act of February 15, 1888, did not apply to the Territory of Oklahoma and inasmuch as section 11 of the act of May 2, 1890, did not adopt the criminal code of Nebraska as a law of the United States, so as to make horse stealing in the Territory an offense against the United, the district Court for the judicial district within and for Logan county, Oklahoma Territory, sitting as a court of the United States, had no jurisdiction over the offence charged against Pridgeon. This position, however, is not well taken. The boundaries of Oklahoma Territory, as defined by the act of May 2, 1890, creating a temporary government therefor did not include the Cherokee Outlet."

Here is a square declaration by the Supreme Court that the boundaries of Oklahoma, as defined by the Organic Act, "did not include the Cherokee Outlet." If that be true, then the Cherokee Outlet must be the country which we claim it to be and a part of the east line of that Cherokee Outlet must, on September 16, 1893, have been along the north and west lines of the Ponca Indian Reservations, so that our client was not in the "country known as the Cherokee Outlet" when he was in the Ponca Reservation. Otherwise this language just quoted from the Pridgeon case is not true, because if the Ponca Reservation was in the Cherokee Outlet then the boundaries of Oklahoma did include a part of the Cherokee Outlet.

Counsel for plaintiff may take certain isolated clauses in this Pridgeon case as a basis for argument that the Supreme Court in that case held that a part of the Cherokee Outlet was in Oklahoma Territory and a part not in Oklahoma Territory. But that argument is not sound and cannot dissipate the force of the decision of that Court that the boundaries of Oklahoma "did not include the Cherokee Outlet."

Where the Supreme Court in that decision spoke of "a part of the Cherokee Outlet not in Oklahoma" and "part was in the Cherokee Outlet not embraced within the boundaries of Oklahoma" and part as "outside of the boundaries of Oklahoma Territory" and "in that part of the Cherokee Outlet herein before referred to," and "that portion of the Cherokee Outlet not em-

braced within the boundaries of the Territory of Oklahoma" and "that portion of the Cherokee Outlet lying west of the Indian Meridian," and "in that portion of the Cherokee Outlet attached to Logan County for judicial purposes" these expressions were used as the last one quoted clearly shows, with reference to "that portion of the Cherokee Outlet attached to Logan county for judicial purposes." None of these expressions, when carefully read in connection with the rest of the sentence or sentences state or intended to mean that a part of the Cherokee Outlet was in Oklahoma and part of the Cherokee Outlet in the Indian Territory, but are descriptive of the situation, not as made by act of Congress, but to describe the portion of the Cherokee Outlet which, under the terms of the Organic Act, was by the Supreme Court attached for judicial purposes to Logan county, Oklahoma Territory. So that in no part of the decision is the direct positive holding that "the boundaries of Oklahoma Territory as defined by the Act of May 2, 1890, creating a temporary government therefor, did not include the Cherokee Outlet," in any way qualified or limited by this decision. And the decision clearly and succinctly states and declares that the Cherokee Outlet did not become a part of the Territory of Oklahoma but remained Indian country after the passage of the Organic Act of May 2, 1890, and under the operation of the Larceny Act passed for the Indian Territory on February 15, 1888, while in the Ponca, Otoe, Missouri, Ton-

kawa and Osage Reservations which were made a part of Oklahoma by the Organic Act, the Act of February 15, 1888, was withdrawn therefrom and this Larceny Act no longer operated therein.

With this decision as authority, there appears and is no escape from the conclusion that from and after the passage of the Organic Act for Oklahoma the land or country known as the Cherokee Outlet,, was intended to comprise that part of the old Outlet for the Cherokee Indians, which had not already been taken from the jurisdiction of such Outlet and embraced within the border of Oklahoma Territory.

DEPARTMENTAL CONSTRUCTION.

That this one hundred foot strip along the eastern border of the Cherokee Outlet was not located down the 96th meridian and along the eastern line of the Osage Reservation, has been the uniform holding of the Interior Department, that executive branch of the Government upon which Congress imposed the duty of enforcing the Act of March 3, 1893, and of carrying out its provisions for the opening of the Cherokee Outlet to settlement.

This construction having been placed upon this provision of the President's Proclamation now to be interpreted by this Court, even if the language is conceded to be open to construction, should have very great weight with this Court, and in case of doubt should be given controlling weight.

This proposition is supported by the decision of the Supreme Court of the United States through a period of nearly three-quarters of a century. In the early case of the *United States* v. *The State Bank of North Carolina*, 6 Pet. 29-40, the Court said:

"It is not unimportant to state that the construction we have given to the terms of the act is that which is understood to have been practically acted upon by the Government, as well as by individuals, ever since its enactment. Many estates of deceased persons, as well as of persons insolvent who have made general assignments, have been settled upon the footing of its correctness. A practice so long and so general would, of itself, furnish strong grounds for a liberal construction, and could not now be disturbed without introducing a train of serious mischiefs. We think the practice was founded in the true exposition of the terms and intent of the act; but if it were susceptible of some doubt, so long an acquiescence in it would justify us in yielding to it as a safe and reasonable exposition."

In the case of *United States* v. *Moore*, 95 U. S., 760, the Court said:

"The construction given to a statute by those charged with the duty of executing it, is always entitled to most respectful considerations and ought not to be overruled without cogent reasons. *Edwards* v. *Darby*, 12 Wheat., 210; *United States* v. *The State Bank of North Carolina*, 6 Pet. 29; *United States* v. *McDaniel*, 7 id. 1. The officers concerned are usually able men and masters of the subject. Not unfrequently they are the craftsmen of the laws they are afterwards called upon to interpret."

In the case of *The United States.* v. *Johnson*, 124 U. S., 236, on page 253, the Court said:

"In view of the foregoing facts the case comes fairly within the rule often announced by this court, that the contemporaneous construction of a statute by those charged with its execution, especially when it has long prevailed, is entititled to great weight and should not be disregarded or overturned except for cogent reasons, and unless it be clear that such construction be erroneous. *Edwards v. Darby*, 12 Wheat, 206, 210; *United States v. Moore*, 95 U. S. 760; *Hahn v. United States*, 107 U. S. 402; *United States* v. *Philbrick, 120 U. S.*, 120 U. S. 52, 59,"

In the case of *Pennoyer* v. *McConnaughy*, 140 U. S., 1, the Court used this language (page 23:)

"The principle that the contemporaneous construction of statutes by the executive officers of the government, whose duty it is to execute it, is entitled to great respect, and should ordinarily control the construction of the statute by the courts, is so firmly imbedded in our jurisprudence that no authorities need be cited to prove it. On the faith of a construction thus adopted, rights of property grow up which ought not be ruthlessly set aside, unless some great public measure, benefit or right is involved, or unless the construction itself is manifestly incorrect."

And in the late case of *United States* v. *Alabama, Etc., Ry. Co.*, 142 U. S., 615-621, the Court held:

"We think the contemporaneous construcnion thus given by the executive department of the government, and continued for nine years

through six different administrations of that department—a construction which, though inconsistent with the realism of the act, certainly consorts with the equities of the case--should be considered as decisive in this suit. It is a settled doctrine or this court that, in case of ambiguity, the judicial department will lean in favor of a construction given to a statute by the department charged with the execution of such statute, and, if such construction be acted upon for a number of years, will look with disfavor upon any sudden change, whereby parties who have contracted with the government upon the faith of such construction may be prejudiced."

Now, as before stated, the Department of the Interior, beginning with Secretary Hoke Smith, who was Secretary of the Interior at the time the rules and regulations for opening the Cherokee Strip were prepared by the Interior Department and were approved and incorporated into the President's Proclamation, and followed by his successors to the present time, has uniformly held that the one hundred foot strip on the east line of the Cherokee Outlet was west of the Osage Nation, and Ponca and Otoe Reservations.

A peculiar force and effect thus attaches to the contemporaneous construction placed upon this clause of the Proclamation. It is therefore important to consider the interpretation placed upon this clause by the department charged with the duty of primarily construing and enforcing the provisions of the Proclamation.

Shortly following the opening the local land

office in the case of *Cagle* v. *Mendenhall*, held in effect that Cagle was, under the terms of the Proclamation, entitled to make the race on the day of the opening from the eastern boundary of Outlet, being the western boundary of the Otoe Indian Reservation. On appeal from that holding the question was presented to the General Land Office. Probably the soundest and ablest decision or brief that has ever been written on this question is the opinion of the Honorable Commissioner of the General Land Office in that case, Because of the ability of that decision and of its being the first formal departmental construction of the Proclamation, made by the same officer who prepared it for the President's signature, we set the same forth in full :

DEPARTMENT OF THE INTERIOR,

GENERAL LAND OFFICE.

Washington, Feb. 5, 1895.

BYRON E. CAGLE	Involving H. E. No. 5777, made March 15, 1894. for N. W. ¼, Sec. 22, Tp. 23 N., R. 1 W., I. M.
vs.	
W. J. MENDENHALL.	

REGISTER AND RECEIVER,

PERRY, OKLA.

GENTLEMEN:

September 19, 1893, L. Haskins made homestead entry No. 457, for the N. W. ¼ Sec. 22, Tp. 23 N., R. 1 W., I. M.

You report that on Oct., 14, 1893, W. J. Mendenhall, the defendant herein, filed affidavit of contest against Haskins' entry, alleging prior settlement. I do not find said affidavit among the papers of the case

Nov. 16, 1893, Byron E. Cagle filed affidavit of contest against Haskin's entry, alleging, "that the said tract is not settled upon and cultivated by said party as required by law; that the said party did not make his said entry until after he had settled upon said land; that he, the said Cagle, was the first settler upon said land; that his settlement was made in the afternoon of Sep. 16, 1893; that he has built a house on the land and has actually resided thereon with

his family from Sep. 16, 1893, to the present time."

February 5, 1894, Cagle filed an amended affidavit, alleging that he had settled upon said tract before Haskins had made his entry for said tract of land; that his settlement was prior to that of Haskins, Mendenhall and all others, etc.

March 15, 1894, Haskins filed a relinquishment and Mendenhall made H. E. No. 5777.

Hearing was had between Cagle and Mendenhall Dec. 4, 1894. Both parties appeared with their attorneys and witnesses and submitted testimony.

Dec. 6, 1894, you rendered joint decision recommending that defendant's entry be canceled, and the prior right of entry according to Cagle.

From this decision defendant, on Dec. 27, 1894, appealed to this office and assigned error, the material specifications of which are as follows:

First.

The Register and Receiver erred in finding and holding that contestant, Byron E. Cagle, made settlement on the land in dispute prior to the settlement thereon by defendant; W. G. Mendenhall.

Second.

Erred in finding from the evidence that Byron E. Cagle has resided upon and improved the land in dispute in compliance with the homestead law of the United States.

Third.

Erred in finding that Byron E. Cagle is qualified to make homestead entry of land in the Cherokee Outlet.

There is little, if any, conflict as to the facts in the case. It clearly appears that Cagle was the first settler upon the tract, and that his residence thereon has been continous from the time he made settlement, on the afternoon of Sep. 16, 1893 to the time of hearing. Defendant settled upon the land the afternoon of Sep.16 1893, some time after plaintiff began his settlement, and has substantially complied with the law as to residence since that time.

Defendant's third assignment of error presents a question more difficnlt of determination. 1t is admitted by plaintiff that he started in the run for the land from a point within a hundred feet from the west line of the Otoe and Missouri Reservation, and that he had been upon the one hundred foot strip bordering on the Otoe and Missouri Reservation and immediately within the territory opened to settlement, prior to noon Sep. 16, 1893.

Was Cagle disqualified from acquiring title to lands opened to settlement by the President's Proclamation of Aug. 19, 1893, by virtue of his having entered upon the land opened to settlement, in the manner hereinbefore stated?

It was provided by act of March 3, 1893, (27 Stat., 640) that the land purchased from the Cherokee Indians, by an agreement concluded between David H. Jerome, Alfred M. Wilson and Warren T. Sayer, duly appointed commissioners on the part of the United States; and Elias C. Boudinot, Joseph A. Scales, George Downing, Roach Young, Thomas Smith, William Triplett and Joseph Smallwood, duly appointed commissioners on the part of the Cherokee Nation of Indians, should be opened to settlement within six months from the date of said act, by the Proclamation of the President.

There were excepted from entry by said act the lands used in connection with the Chilocco Indian Schools, certain allotments, and sections 16 and 32 in each township reserved for the benefit of the public schools.

It was further provided in said act "that no person shall be permitted to occupy, or enter upon lands herein referred to, except in the manner prescribed in the Proclamation of the President opening said lands to settlement, and any person otherwise occupying and entering upon said land shall forfeit all right of acquiring such land."

The President's Proclamation, dated Aug. 19, 1893, prescribed that

"A strip of land one hundred feet in width, around and within the outer boundaries of the entire tract of country to be opened to settlement under the proclamation is hereby temporarily set apart for the following purposes and uses, viz:

Said Strip, the inner boundaries of which shall be one hundred feet from the exterior boundary of the country known as the Cherokee Outlet, shall be opened to occupancy in advance of the day and hour named for the opening of the said country by persons expecting and intending to make settlement pursuant to this proclamation. Such occupancy shall not be regarded as trespass or in violation of the proclamation or of the law under which it is made; nor shall any settlement rights be acquired thereby."

While there is no argument accompanying the appeal of defendant, I glean from the preliminary motions and from a statement in the defendant's fourth assignment of error, that his contention as to the disqualification of plaintiff

Cagle is based upon the fact that Cagle entered upon the strip one hundred feet in width, immediately west of the Otoe and Missouri Reservation.

I do not think, that in view of the unequivocal language of the statute empowering the President to provide such rules and regulations for the opening of said lands to settlement as he saw proper, it could be contended that the President was without authority to temporarily set aside this strip as a starting point for the intending settlers, and that if the President did so set apart the strip, Cagle did not violate the law in entering upon the same prior to noon, Sep. 16, 1893.

The first part of the order setting aside this strip clearly gives homeseekers the right to enter upon the strip west of the Otoe and Missouri Reservation, inasmuch as it provides that a strip "one hundred feet in width around and immediately within the outer boundaries of the entire tract of country to be opened to settlement," etc., shall be set apart.

There is, however, an apparent conflict upon the face of the order designating the location of this strip, in that the order further prescribed that "Said strip, the inner boundary of which shall be one hundred feet from the exterior boundary of the country known as the Cherokee Outlet, shall be open to occupancy in advance of the day and hour named for the opening of said country," etc.

This "strip temporarily set apart" was never surveyed or marked out by any authority and each intending settler was left to ascertain the location thereof.

What is the country known as the Cherokee Outlet, to which the President made reference?

It was provided in a treaty between the United States and the Cherokee Nation of Indians, concluded in 1828, (7 Stat., 3111) that the Government of the United States should possess the Cherokee Nation of Indians, and "guarantee it to them forever," seven million acres of land, the eastern boundary of which was given and the northern and southern boundaries fixed in part by the Arkansas and Canadian Rivers, it being provided that said territory should extend far enough west so as to make seven million acres of land, and,

"In addition to the seven million of acres thus provided for and bounded, the United States further guarantee to the Cherokee Nation a perpetual outlet west and a free and unmolested use of all of the country lying west of the western boundary of the above described limits, and as far west as the sovereignty of the United States and their right of dominion extend."

According to this treaty a large portion of the lands ceded to the Creek Indians was included in the cession to the Cherokees, and by a treaty concluded between the United States and the Cherokees in 1833, (7 Stat. 414) the boundaries of the seven million acre tract ceded to the Cherokees was changed, but the same number of acres was granted to them, and the same provision as to an outlet west was incorporated in said treaty. By another treaty concluded between the same parties in 1835, (7 Stat., 578) the government of the United States agreed to issue patent to the Cherokees for the home tract and for the outlet lands, as well as for a strip of land purchased from the United States by the Cherokees.

By a treaty concluded between this Government and the Cherokee nation in 1866, (14 Stat.,

799) it was provided that the United States might settle civilized Indians friendly to the Cherokees, on the lands of the Cherokees.

A different regulation was made as to settling those Indians east and west of 96°, and from this provision possibly arose the erroneous impression that 96° was the dividing line between the home and outlet tracts of the Cherokees.

In this connection, the following quotation from a letter from Hon. T. J. Morgan, Indian Commissioner, to Secretary Noble, is not amiss:

"It may be remarked here that the western boundary of the 7,000,000 acres has never been ascertained, and no man knows to this day where the 'home' ceases and the 'outlet' begins. Certain it is that a portion of the lands west of 96° commonly regarded as constituting the outlet, are a part of the home, for the Cherokee Country without any of these lands comprises but 5,031,-351 acres." (See Senate Ex. Doc., No. 56, 52d Con., 1st Ses.)

It was provided by the act of March 2, 1889, (25 Stat., 105) that the President was authorized to appoint three commissioners to treat with the Cherokees and other nations of Indians owning and claiming lands lying west of the ninety-sixth degree of longitude, and that the Commission was authorized to submit to the Cherokee Nation the proposition that said nation should cede to the United States all their rights in said lands, and if the Cherokees should accept said offer, the said lands should become a part of the public domain.

The act of May 2, 1890, providing a government for Oklahoma, prescribed that "whenever the interest of the Cherokees in the land known as the *Cherokee Outlet* shall have been ex-

tinguished and the President shall make proclamation thereof, said outlet shall without further legislation become a part of the Territory of Oklahoma." (26 Stat., 82). In prescribing the boundaries of Oklahoma, in the act referred to, *supra*, the Ponca, Tonkawa, Otoe and Missouria Reservations are included therein, and the "Cherokee Outlet" is given as one of the boundaries. (See also case of *U. S.* v. *Pridgeon*, 153 U. S. Reports, 48.)

Jan. 9, 1892, the Commissioners reported that they had effected an agreement with the Cherokees, but that they had not been able to secure the lands upon the terms authorized by the act of March 2, 1889. In their report the Commissioner says:

"The lands embraced within the description, include the Osage and Kansas reservation, the Tonkawa, Ponca, Pawnee, and Otoe reservations, and the *Cherokee Outlet*, and contains 8,144,632.91. acres * * * The reservations above mentioned have been included in this agreement because the Cherokees have claimed a contingent interest therein. * * * The amount of money the Commission has agreed to pay is $1,106,017.34, more than advised in said original letter of instructions.

If the amount agreed to be paid is applied to the 6,022,754.11, then the price per acre is $1.43.

If the amount, however, is applied to all the lands west of the Arkansas River, 6,547,486.55 acres, then the price per acre is a fraction less than $1.31.

Again, if the price agreed to be paid is applied to all the lands embraced within the boundaries of the lands ceded, 8,144,682.91 acres, then the price per acre is $1.05."

Although the treaty of 1866 provided that when the land of the Cherokees was sold by them to other Indians the title of the Cherokees "should terminate forever as to the lands sold," yet it seems that they claimed an equity in the lands and refused to cede the unoccupied lands unless they were given a certain amount for the lands occupied by other Indian tribes west of 96°.

According to the report of the Commission, the Cherokees refused to sell the lands which Congress had authorized the Commissioners to purchase, unless they were given a certain amount, and this amount the Commissioners, on the part of the United States, agreed to give, and in order to settle any questions that might arise in the future, the treaty provided for a cession of all lands in which the Cherokees had any right or interest west of 96°. Hence it was necessary that the Congress should ratify the treaty, before it became operative.

I have before me a map of the United States and Territories, issued in 1892, under the direction of Hon. T. H. Carter, former Commissioner of this office, on which there appears, as a part of the Indian Territory, and Oklahoma Territory, the Cherokee Nation, the Osage Reservation, the Ponca, Pawnee, Tonkawa, Otoe and Missouria Reservations, and the *Cherokee Outlet.* I have also an atlas of the world, prepared by Mast, Crowell & Co., on page 52 of which the map of the Indian Territory is given. Here also appears the subdivision noted *supra.* In both of these maps the Cherokee Outlet is substantially identical with the territory opened to settlement by the President's Proclamation of Aug. 19, 1893.

There can be no doubt that these reservations were not regarded by the Congress as a

part of the "Cherokee Outlet," as understood by the reference thereto wherein it is prescribed "Whenever the interest of the Cherokee Indians in the land known as the Cherokee Outlet shall have been extiguished, and the president shall make proclamation thereof, the said *Outlet* shall thereupon and without legislation become a part of Oklahoma." It is also manifest that the Congress did not regard these reservations as a part of the land owned by the Cherokees, west of 96° of longitude, referred to in the appointment of the Commission, March 2, 1889, for it was prescribed by said act that whenever the title of the *Cherokees* was extinguished said land, should, upon the proclamation of the President, become a part of the public domain, for if such reservations were a part of the land owned by these Indians, then, under the terms of said act they would become subject to settlement, in violation of the solemn treaty obligations. These Indians, for the most part, if not all of them, not only bought these lands from the Cherokees, but exchanged with the United States Government other lands therefor. In the report of the Cherokee Commission these reservations are referred to by name and, together with the "Cherokee Outlet," form the territory which the Cherokees granted to the United States by said treaty.

The letter of Hon. T. J. Morgan, formerly Indian Commissioner, from which I have quoted *supra*, shows that the Cherokee home tract, extending to 96° west longitude, contains only 5,031,351 acres; that according to the estimate made in 1835, by Hon. Lewis Cass, then Secretary of War, the entire country granted to the Cherokees consisted of about 13,800,000 acres, of which seven million acres was included in the

home tract, six million in the "outlet" and 800,000 purchased from the United States by the Cherokees.

The report of the Cherokee Commission shows that there was included in the grant from the Cherokees 8,144,682 acres of land, of which 2,121,928 acres were embraced in the Indian Reservations; showing that the entire Osage Reservation and almost the entire Ponca, Pawnee and Otoe Rerservations, were at no time a part of the Cherokee Outlet, but were carved out of the Cherokee home tract, and that if the line between the home tract and the outlet lands had been established, it would have been almost identical with the western line of the Ponca and Otoe Indian Reservations.

I have given this extended review of these treaties to show that little, if any, of the lands owned and occupied by the Indians in the country between the lands now held by the Cherokee Nation and the land opened to settlement by the President's proclamation of Aug. 19, 1893, was ever a part of the Cherokee outlet proper.

I have cited the different acts of Congress bearing on this subject, to show that the Commissioners, as provided by Congress, were authorized to purchase the unoccupied portion of the Cherokee lands west of 96° west longitude, it being the position of the United States that according to the plain provisions of the treaty of 1866, the Cherokees had parted title with all lands bought from them by the Indians who settled upon their lands west of 96°, and that when the treaty between the Commission, on the part of the United States, and the Commissioners acting for the Cherokee Nation was alluded to, and the sufficient amount of money appropriated to pay for the cession of said lands to the United

States by the Congress (27 Stat., 640), that the reference to the "Cherokee Outlet" applied only to the unoccupied lands purchased from the Cherokees. This conclusion is further borne out by the fact that, while the Congress provided for the reservation of the Chilocco School lands, the public school sections and the allotments made by said treaty, no specific reservation of these lands was made. It is manifest that the Congress would have reserved these Indian Reservation lands from settlement, if they had been deemed a part of the country opened to settlement, known as the "Cherokee Outlet."

For the foregoing reasons, I am convinced that when the President prescribed that a strip of land one hundred feet in width should be set aside around and immediately within the country to be opened to settlement, that by the "Cherokee Outlet," and the "entire country to be opened," identically the same territory was meant.

Admitting, however, that the country known as the "Cherokee Outlet," and the country opened to settlement were not identical, a simple rule of statutory construction would locate the strip "around and immediately within" the country opened to settlement, for in that case, the proclamation contains two provisions repugnant to each other. The provision easily understood, simple of application and evidently expressing the purposes for which the legislation was intended, is always taken, as opposed to a provision that is confusing, impracticable and subversive of the purposes for which the legislation was enacted.

The purposes for which this strip was set apart were expressed in the order, i. e., "to al-

low intending settlers to enter the same before the hour of noon, Sept. 18, 1893." The object in opening this strip was obviously to protect people owning lands bounding on this country from trespass, and at the same time provide all homeseekers with a common starting place. It would be absurd to provide a starting place sixty or seventy miles from the nearest lands opened to settlement. To reach the land opened to settlement immediately west of the Tonkawa Indian Reservation, a settler starting from 96° west longitude and traveling in a due west course would have to pass over private property a distance twice as great as the widest part of the land opened to settlement. Locating this strip east and upon the Osage Reservation, as would be done if the construction be given the proclamation, that the strip should extend around the entire country ceded to the United States by the Cherokees, would not only render the strip of no practical use, but would be a violation of the treaty obligations with these Indians, as it would set apart a portion of their territory for temporary public use, without their assent, and subject their lands to trespass by those who ran from said strip to the lands opened to settlement.

For these, if for no other reasons, the plain intendment of the proclamation would place the strip temporarily set aside "around and immediately within the lands opened to settlement."

There was introduced in evidence, and filed as an exhibit in said case by defendant, W. J. Mendenhall, the following telegram:

Washington, D. C., Aug. 30, 189

W. J. MENDENHALL,

Settlers will not be permitted to enter the strip from any Indian Reservation, nor

will settlers be permitted to cross the strip before the hour of opening. Booths will be arranged on the Kansas side of and also on the Oklahoma side of the strip.

JOHN R. REYNOLDS,
Acting Sec'y.

There is nothing repugnant to the conclusion hereinbefore reached, expressed in this telegram.

Settlers are not prohibited thereby from assembling on the one hundred foot strip "around and immediately within the country to be opened to settlement," bordering on these reservations. It was doubtless the purpose of the Hon. Acting Secretary, at least his words imply as much, to notify parties that they would not be allowed to trespass upon these Indian Lands. If the Hon. Secretary had held differently, inasmuch as by the act opening these lands to settlement, and in the President's Proclamation there was no prohibition as to occupancy except as to the lands opened to settlement, these Indian lands would likely have become a rendevous for those desiring to enter the territory from the east.

Admitting, however, that the telegram of the Hon. Acting Secretary could be construed to mean that settlers would not be allowed to assemble upon this "one hundred foot strip" west of these reservations, it will be observed that the Hon. Acting Secretary did not prescribe by said telegram any penalty for entering in controvention thereto, nor indicate the consequences of such entry.

Finally, the act opening said lands to settlement, provides "that the Secretary of the Interior shall, under the directions of the President, prescribe rules and regulations not inconsistent with this act, for the occupation and settlement

of said lands, to be incorporated in the Proclamation of the President, which shall be issued at least twenty days before the time fixed for the opening of said lands."

The Hon. Secretary of the Interior did prescribe such rules under the direction of the President, and they were incorporated in said proclamation, and it cannot be presumed that in a telegram to a private individual, without any notice to other homeseekers, the Hon. Secretary would attempt to abrogate a plain provision of the President's Proclamation, by disqualifying those who had assembled upon this strip, in conformity with the President's Proclamation.

You did not err in holding that Cagle was not disqualified from acquiring land opened to settlement by the President's Proclamation of Aug. 19, 1893.

Your decision is affirmed, and Mendenhall's entry is held for cancellation, subject to the exercise by Cagle of his preference right within thirty days from notice that this decision has become final.

Notify the parties. Advise defendant of his right of appeal.

Very respectfully,

S. W. LAMOREUX,
Commissioner.

Such is the view the department originally took of the proclamation. This construction has been uniformly followed. No decision has ever held the hundred foot strip to be located on the 96th meridian, or elsewhere than on the immediate boundary of the lands opened to settlement. The "country known as the Cherokee Outlet" has been held to be identical with the "entire tract of country to be opened to settlement." For nine years and a half the department has consistently administered the law as thus construed. Hundreds of patents have been issued (outside of the contested cases) to men who ran from these reservations. In the eastern portion of the Outlet titles now rest in a very large measure upon the law as thus settled by the department, which had charge of the primary enforcement and construction of this provision of law. The record clearly shows that the district and the supreme court of the territory have followed closely the same construction. It has thus grown into a rule of property of nearly ten years standing. Under the circumstances a reversal of this construction at this late day would be almost a calamity. Not only the titles of thousands of acres of these lands are involved. Many of the people from the reservations settled upon town lots, and their titles would likewise be placed in jeopardy. The community would be plunged into a sea of litigation.

When the plaintiff asks this court to overturn such a well settled rule of construction, he assumes the burden of showing "that the con-

struction itself is manifestly incorrect." This can only be accomplished by showing that the term "Cherokee Outlet" was incapable of the construction the department has placed upon it. To show that this term was incapable of that construction it must be made to appear that it had formerly acquired a well defined, well settled meaning which was entirely repugnant to that applied to it in the department.

It therefore is highly important to look closely into the origin, history and application of the term "Cherokee Outlet."

This, fortunately, the Commissioner has done for us in the decision last quoted. It is there clearly shown that the eastern boundary of the "Outlet" was never fixed or definitely determined. The line where the 7,000,000 acres of the "home" tract ceased and the "Outlet" began was never located. It was from first to last entirely undefined. Then it appears that the precise boundary that is in dispute here has from the first been at all times unsettled and undetermined.

After being then created with this indefinite eastern boundary other elements of uncertainty were added. First, the Osage reservation was carved out of these Cherokee lands, then followed from time to time other minor reservations. While these lands were purchased outright at a price fixed by treaty and under a provision that the title of the Cherokees "should terminate forever as to the lands sold," yet, the Cherokees still consider them as their "Outlet,"

while the rest of the world treated their title as extinct. Consequently we find the phrase "Cherokee Outlet" sometime used to designate such portions as were yet unsold, and at other times to designate those reservations as well.

When the Territory of Oklahoma was created the reservation thus carved out of the Cherokee lands was expressly made a part of the new territory, while the unoccupied portion lying west of them was designated as the "Cherokee Outlet," and provisions made for attaching it to the territory whenever it should be opened to settlement. Thus matters became more and more complicated, and the phrase "country known as the Cherokee Outlet," or "commonly known as the Cherokee Outlet," were coined and used in contradistinction to the original "Outlet." On every hand we find elements of uncertainty surrounding that term. It is, therefore, manifestly impossible for plaintiff to show any clear, defined, well-settled and exclusive application of this term to one specific tract. It was used quite indiscriminately to refer to all or various parts of these lands as might suit the immediate purpose in hand.

Certainly there was no established, exclusive meaning that was repugnant to view which the Department adopted.

Plaintiff has in no wise shown that the department's "construction is manifestly incorrect." As we have seen, that construction is supported by the direct precedent found in the organic act, also by the report of the Cherokee

Commission who made the treaty of purchase, it is borne out by the official maps of the United States in existence at the date of the proclamation, and has received the stamp of approval of this court in the case of *U. S.* v. *Pridgeon.* Moreover, it is the only construction not repugnant to the prior clause defining the same strip. It alone gives full effect to the purposes for which that strip was created. The opposite construction is untenable, repugnant and leads to many absurdities.

Under such circumstances it is clear that the construction reached by the Interior Department is the correct and sensible one. That nothing is now shown as a reason for overturning that construction after it has become an important rule of property in Oklahoma Territory.

Secretary Hoke Smith did, it is true, reverse the *Cagle* v. *Mendenhall* decision which we have quoted. That opinion is found in 20 L. D. 446. We call the courts attention, however, to the fact that this opinion was shortly thereafter overruled and expressly reversed, and that it was not the rule of construction adopted by the department but an exception, ~~but~~ in conflict with the line of decisions both before and after it was rendered.

Even this now famous case does not sustain the plaintiff's construction. Instead of supporting the theory that the 100 foot strip was on the 96th meridian or the eastern boundary of the Outlet as distinguished from the east border of the lands opened to settlement, the Hon. Secre-

tary expressly admitted all our contentions as to its location, and located that strip exactly as we do. The disqualification imposed upon Cagle was not based upon this clause, or, indeed, any clause found in that proclamation. While locating the 100 foot strip on the immediate border of tract opened to settlement, and thus sustaining the department's uniform construction, Secretary Smith invented a theory that no one before or since has ever seriously entertained. He proceeds upon the sheer assumption that there was yet a treaty with the Cherokees making it unlawful for white men to, in any wise, go upon the Osage and other reservations carved out of their lands, and after assuming this, he proceeds upon the equally fallacious theory that any such intruder upon those reservations was disqualified not under the proclamation, but by the terms of the treaty which he assumed to be still in effect. We show that such is the exact theory of that opinion by quoting it at length:

"The controlling question in the case is, whether or not the contestant, Cagle, was disqualified because of his having entered the Territory from the west line of the Otoe and Missouri Indian Reservation.

"Prior to the opening of said territory by proclamation of the President, the Department, in answer to inquiries as to whether settlers would be permitted to enter the strip from any of the Indian reservations on the eastern side of the territory, informed that the run could not be made from any of those reservations, and instructions were issued to remove all persons

from the hundred foot strip on the eastern boundary. This was the construction placed by the Department on the proclamation of the President prescribing rules and regulations for the occupancy of said lands.

"The question was referred by this Department to the Assistant Attorney-General for an opinion as to whether, under the President's proclamation, settlers would be permitted to make the run from the Osage and Ponca reservations. On August 28, 1893, he submitted an opinion to the effect that *in view of the treaty between the United States and the Cherokee Indians, prohibiting persons from entering the Indian Territory for any purpose except those specified in the treaty, or by express provision of the United States, all persons were prohibited from going upon those reservations for the purpose of making what is called "the run" into the Cherokee Outlet on the day of the opening, and that it was the duty of the Department to take such measures as would effectually prevent any such trespass on the part of those who expected to enter the "Outlet" for the purpose of making such settlement.*" [The italics are ours.] This opinion was approved by the Department, and notices were sent by the Department stating that settlers would not be allowed to make the run for claims from the Osage and Ponca reservations. (See letters to Harding & Riddell, Arkansas City, Kansas, dated August 26, 1893.)

On September 4, 1893, the special agent charged with the generel supervision of opening the Cherokee Outlet requested to be advised whether persons would have the right to make the run from the eastern border of the tract; and on September 5, 1893, he was instructed that they could not.

These instructions were communicated to the officers of the army and of the Land Department charged with the duty of enforcing the rules and regulations governing the occupation, and were by them given general publicity.

After careful consideration of the questions presented in this case, I am satisfied that the action of the Department in forbidding persons from making the run from any of the reservations on the eastern border of the "Outlet" was not inconsistent with the Act of Congress; and it being generally known that such instructions had been issued, settlers who acted in obedience thereto should not be defeated in their rights by others who, as a matter of fact, obtained advantage over them by making the run from adjacent Indian reservations.

The decision of your office holding Mendenhall's homestead entry for cancellation was erroneous.

Now, the Secretay in that decision was discussing the run made by Cagle from the west line of the Otoe Indian Reservation and he referred to the instructions of the Department issued prior to the opening to "remove all persons from the one hundred foot strip on the eastern boundary." The eastern boundary of what? This is answered later on in the decision in the declaration that the instructions referred to persons who were prohibited "from making the run from any of the reservations on the eastern border of the "Cherokee Outlet." Necessarily the eastern boundary there referred to by Secretary Hoke Smith was the one hundred foot strip on the eastern boundary of the "country known as

the Cherokee Outlet," for that one hundred foot strip was on the eastern boundary of something, and if it was upon the eastern boundary of the Osage Reservation then it would have been at the place where counsel for Mendenhall in that case and for Winebrenner in this case claim it was intended by the President to be, and it would have been so far removed from Cagle's location on the west line of the Otoe Reservation as to have made it unimportant to refer to it in that decision. Besides, the deduction in the letter referred to (August 28, 1893), was that settlers would not be allowed to make the run into the Outlet for claims from the Osage and Ponca Reservations. These, then, were necessarily the Reservations that were adjacent to the one hundred foot strip from which parties were supposed to have been prohibited from making the run, and the force and effect of the decision is to hold that this one hundred foot strip was west of these Indian reservations.

This contention, that parties became disqualified by reason of having made the run into the Cherokee Outlet from the Otoe, Missouri and other Indian reservations in Oklahoma Territory in violation of the Secretary's instructions issued subsequent to August 19, 1893, was manifestly unsound and as we have seen that decision was reversed. The Act of Congress under which the land was opened stated:

"The Secretary of the Interior shall, under the direction of the President, prescribe rules and regulations, not inconsistent with this Act,

for the occupation and settlement of said lands, to be incorporated in the Proclamation of the President, which shall be issued at least twenty days before the time fixed for the opening of said lands."

These orders of the Secretary not made twenty days before the opening, and not incorporated in the President's Proclamation were absolutely void in so far as they have in any way conflicted with the terms of the Proclamation.

The unsoundness of that decision of *Cagle* v. *Mendenhall* consisted not in holding that the one hundred foot strip was on the east side of the Osage Reservation—because the opinion holds the opposite as we have heretofore shown—but in holding that in view of the treaty between the United States and the Cherokee Indians prohibiting persons from entering the Indian Territory for any purpose except those specified in the treaty or by express provision of the United Sttates, all persons were prohibited from going upon those Reservations for the purpose of making what is called the run in the Cherokee Outlet. In view of the fact that the Cherokees had released all of their right and claim of every kind and nature to all of the lands in the old Cherokee Outlet west of the 96th meridian, it would seem strange that any law officer of the Interior or any other Department could come to the conclusion that those treaties could have any operation whatever at that late day in the protection of a right supposedly existing in the Cherokees, but which they had long since sold and been

compensated for. If it were true, however, that those treaties prohibited any entry upon that part of the old Cherokee Outlet that had been subsequently ceded and conveyed to the Osage and other Indians, such prohibition was not carried into the President's Proclamation, and the mere fact that a person might, by going into and remaining in an Indian reservation, renders himself liable to be removed therefrom, would certainly not disqualify him as a homestead entryman, for no such condition of disqualification is contained in the Act of Congress or the President's Proclamation opening this Cherokee Strip land to settlement.

The next decision of the Secretary of importance on this question is that of *Brady* v. *Williams*, decided by Secretary Francis on December 23, 1896, (23 L. D., 533). That part of the Secretary's decision referring to this question is as follows:

"The evidence clearly shows that Brady got on the land about 1:10 p. m., that McDonald was next there and Dahl was last of the three; that Brady made the run from the east side of the Arkansas river, which divides the Osage Reservation and the Outlet, starting at 12:01; that McDonald and Dahl each ran from the north line of the "Strip."

It therefore follows that as between McDonald and Dahl, the former is the prior settler, and if the doctrine of *Cagle* v. *Mendenhall* is sound and to be followed, that Brady acquired no right to the land by reason of his settlement prior to McDonald. I find myself, however, unable to

yield assent to the doctrine announced in that case.

By Act of Congress, March 3, 1893 (27 Stat., 640), that part of Oklahoma Territory known as the Cherokee Outlet was declared open for settlement by the President's Proclamation any time within six months from the date of the act. Among other things contained in the act is this (Sec. 10, p. 643):

"No person shall be permitted to occupy or enter upon any of the lands herein referred to, except in the manner prescribed by the Proclamation of the President opening the same to settlement; and any person otherwise occupying or entering upon any of said lands shall forfeit all rights to acquire any of said lands.

"The Secretary of the Interior shall, under the direction of the President, prescribe rules and regulations not inconsistent with this act, for the occupation and settlement of said lands, to be incorporated in the proclamation of the President, which shall be issued at least twenty days before time fixed for the opening of said lands."

The proclamation of the President (17 L. D., 230), presumably prepared in accordance with the act, was promulgated August 19, 1893, declaring the land open to settlement at 12 o'clock noon, central standard time, Saturday, September 16, 1893. And among other regulations contained in this proclamation was this, on page 239:

"A strip of land one hundred feet in width around and immediately within the outer boundaries of the entire tract of country to be opened to settlement under this proclamation, is hereby temporarily set apart for the following purposes and uses, viz:

"Said strip, the inner boundary of which

shall be one hundred feet from the exterior boundary of the country known as the Cherokee Outlet, shall be opened to occupancy in advance of the day and hour named for the opening of said country, by persons expecting and intending to make settlement pursuant to this proclamation. Such occupancy shall not be regarded as a trespass, or in violation of this proclamation, or of the law under which it is made; nor shall any settlement rights be gained thereby."

This reservation was "around and immediately within the outer boundaries of the entire tract of country;" no limitation or exclusion of any portion thereof. The purpose of this reservation was well understood by all familiar with the vexed questions that so often arose in cases arising out of the former openings to settlement of the Oklahoma Territory, where the question was as to whether the individual was over the line or not at the instant of starting. Also to prevent individuals who owned the lands adjoining the Outlet from obstructing those seeking homes therein by refusing to allow them to congregate on their lands preparatory to making the run. To avoid these complications the President made this reservation to enable all intending to enter lands to congregate on this Strip and get an even start.

By this proclamation, the reservation thus made was on the east side of the Outlet as well as upon all the other sides. It must be assumed that it was known to the President and the Secretary of the Interior at the time the Proclamation was promulgated that the Indian Reservations of the Kansas, the Osages, the Poncas and the Otoes and Missourias immediately joined the Outlet on the east, yet there is no inhibition in the Proclamation from settlers entering upon

those Reservations—the one hundred foot reservation created by the Proclamation.

It was this Proclamation, made in pursuance of the Act of Congress, and containing rules and regulations made by the Secretary of the Interior for the opening and settlement of the land, that was the guide by which all those intending to enter the Territory should be controlled. It was formally promulgated, it bore the signature of the President of the United States, and the great seal of State. By it all persons were invited to the one hundred foot reservation, regardless of which part of the land it might be, either in imagination or reality, located. No other public or official pronunciamento was made, and the only authoritative, official or legal utterance is contained therein.

The statements made in the case of *Cagle* v. *Mendenhall* are somewhat misleading. In reference to the instructions issued and publicity given to them, as stated therein, it is only necessary to say that there is no official record in this Department of the same. There were several telegrams sent from the office of the Secretary of the Interior to private individuals, but none to any government officials in relation to this matter. The instructions of September 5, 1893, referred to, is a telegram from your office to "Emmet Womack, Special Agent." This is signed by the Commissioner, but does not purport to be given under authority of the Secretary of the Interior.

In every one of the communications sent from the Department, with the exception of that of September 13, to Ned. P.C.Gould, which will be adverted to hereafter, the information is that intending settlers will be prohibited from making the run from "Indian Reservations,"

but there is no mention of the one hundred foot strip, or inhibition from making the run from the same.

If, as before stated, the President's Proclamation created the one hundred foot strip on the east side of the Outlet, and persons made the run from there in good faith, can it be said that the route they traveled to get to the strip disqualified them from making entry? I think not. I do not believe it is within the power of the Executive branch of the Government to fix qualifications of one making a homestead entry. Congress, the law-making power has done this, and the right of the individual cannot be enlarged or abridged by executive order. The only disqualification fixed by Congress was that no one should "acquire any of said lands" who entered upon or occupied any part thereof "except in the manner prescribed in the Proclamation of the President, opening the same to settlement." The purpose of this was well understood. It was to give all persons from every part of the country an even chance to secure a home, and prevent those in the immediate vicinity from securing the choice lands. Following this Declaration by Congress, the Secretary of the Interior, under direction of the President, prescribed "rules and regulations not inconsistent with this Act" which was incorporated in the Proclamation. By this the one hundred foot strip was solemnly set apart for occupancy by the settlers, and there was no direction as to how parties would travel to get to it.

The only theory by which the Secretary of the Interior could possibly prevent parties from making the run from these Indian Reservations was that under the laws and treaties with the

tribes white people were not allowed therein, and were trespassers, and could be forcibly and summarily removed as such. But, if in ignorance of this fact, they actually did get into the Reservations, can this in any just and legal sense be said to disqualify the individual from making a homestead entry in the Outlet? I do not so understand it. And if they passed through the Indian Reservations and got onto the one hundred foot strip and made the run from there in good faith, should they be deprived of their homestead rights? I find myself unable to yield assent to such a proposition. If the settler were guilty of a crime either against the United States or the Indians he would not be disqualified from availing himself of the right to make a homestead entry." * * *

I cannot escape the conviction that Brady was not disqualified from making the homestead entry by reason of having made the run from the point where he started. He was the prior settler on the land and is therefore entitled to make homestead entry of the same.

"The case of *Cagle* v. *Mendenhall* is overruled and your office decision is reversed."

In view, then, of this uniformity of construction of the Department that the one hundred foot strip lay on the east side of the Cherokee Outlet and adjacent to the Osage, Ponca and Otoe and Missouri reservations, even if there were room for questioning the clear language of the President's Proclamation admitting of entry from "a strip of land one hundred feet in width around and immediately within the outer boundaries of the entire tract of country to be opened to settlement," and which one hundred foot strip

is "from the exterior boundary of the country known as the Cherokee Outlet," and in view of the fact that the "country known as the Cherokee Outlet" was that portion of the old Cherokee Outlet which remained after the boundaries of Oklahoma were defined, and which was to become a part of Oklahoma upon the proclamation of the President, we think, if there is any room for the construction of this clear language, the Court should follow the many decisions of the Supreme Court of the United States holding that the construction placed upon laws by the Executive Department, should be followed by the Court and the decisions of the Department upheld and the land titles allowed to remain where they have been placed by that Department of Government which is vested by Congress with the jurisdiction of passing upon these applications to make homestead entry, and of deciding to whom the Government titles shall be conveyed.

The desperation of those persons who are seeking to have the courts place this strained construction upon the act of Congress and President's proclamation opening the Cherokee Outlet to settlement is well illustrated by the citation by counsel of part of Sec. 14 of the Act of Congress of March 2, 1889, and the claim thereunder that it was the intention of the Government to open to settlement all of the land lying west of the 96th meridian.

The desperate position that all of the land lying west of the 96th meridian was intended by Congress and the President's proclamation to be

opened to settlement, must be sustained in order to place the one hundred foot strip "immediately within the outer boundaries of the entire tract of country to be opened to settlement" and on the 96th meridian. Otherwise, the one hundred foot strip could not be on the east line of the Osage Reservation.

In the light of the subsequent legislation, Section 14 of the Act of March 2, 1889, has little, if any, relation to this controversy, and renders no assistance, whatever, in determining where the one hundred foot strip around and immediately within the outer borders of the tract of country to be opened to settlement, being the territory "known as the Cherokee Outlet," was located. For the Cherokee Outlet, about which the President was speaking in his proclamation, was the the land which was purchased of the Cherokee Indians, and was being opened to settlement, and not any lands that had not been purchased from the Osage, Kaw, Ponca, Otoe and Missouria Indians. The portion of Section 14 referred to, shows on its face that it was then recognized that other Indians besides the Cherokee Indians owned or claimed land lying west of the 96th meridian, and the language contained in the proviso to Section 14 shows that it was the intention of Congress only to open to settlement the lands which should be acquired from the Cherokee Nation of Indians separately from those that might be acquired from other Indians. The section provided that when this purchase was made of the Cherokee Indians "the said

lands shall thereupon become a part of the public domain."

Now it seems to us that Congress could hardly have intended that when the lands lying west of the 96th meridian, in which the Cherokee Indians were interested, were purchased from such Indians, that thereupon and immediately those other lands which were owned by the Osage, Kaw, Ponca, Otoe and Missouria Indians and not purchased by such agreement, or even mentioned in the proviso, should thereupon become a part of the public domain.

This declaration that the Indian lands when acquired by the Government, shall thereupon become a part of the public domain," is an expression used in many, in fact most, of the acts of Congress approving treaties by which the Government acquired lands from the Indians and in no instance is this declaration used as a designation of the status of lands to which any Indians have any ownership whatever.

Certainly, Congress did not intend that the land of the Osage and other Indians west of the 96th meridian which could not be acquired by treaty with the Cherokee Indians should become a part of the public domain, and so, it naturally follows that the prohibition against any persons being "permitted to enter upon and occupy the same" must be held to relate only to such lands as have "become a part of the public domain."

We say that this Section 14 can have little, if any, bearing—has in fact no bearing—upon this controversy, because it not only does not

contain the expression "country known as the Cherokee Outlet," as used in the President's Proclamation, but it makes no reference to the Cherokee Outlet as such, and furthermore, because the Act of March 3, 1893, opening the Cherokee Outlet, entirely covered the question of opening lands acquired from the Cherokee Indians, and also the terms upon which they would be opened to settlement, including also the prohibition against any person occupying or entering upon any of said lands, except "in the manner prescribed by the proclamation of the President opening the same to settlement."

We do not believe there is anything in Section Section 14 of the Act of March 2, 1889, to support the conclusion drawn by counsel, that Congress intended in that legislation to open all of the lands owned or claimed by the Indians west of the 96th meridian to settlement. The proviso of this section referring to opening any of said lands to settlement, limits its scope to snch as should be acquired from the Cherokee Nation, and expressly omits any reference to the lands of "all other Indians owning or claiming lands," lying west of the 96th meridian. The negotiations which were carried on by the Commission under the authority of this section never resulted in the making of any treaty, whereby the lands of the Osage, Kaw, Ponca, Otoe and Missouria Indians were to be opened to homestead settlement, and at the time Congress came to pass upon the work of the Commission and enacted the legislation which directly resulted

in the opening of the Cherokee Outlet to homestead settlement, no treaties with those other Indians mentioned, than the Cherokees, were in any way referred to, and the Court takes judicidl knowledge of the fact that the Osage, Kaw, Ponca, Otoe and Missouria Indians own their lands under treaty and patents long since made, which took these lands out of the Cherokee Outlet, if ever in it, and which fact had almost three years before caused Congress in the sections defining the boundaries of Oklahoma, to describe the remaining land of the Outlet west of the 96th meridian, and which were not included in the boundary of Oklahoma by that Act, as the land "known as the Cherokee Outlet," and which language the President adopted in his Proclamation opening this land to settlement, and evidently referred to the same land and the same country as that described as such in the Organic Act, and no other.

The prohibition contained in Section 10 opening the Cherokee Outlet prohibiting any person from occupying or entering upon "any of the lands herein referred to" was meant by Congress to apply to the lands of the Cherokee Outlet, which Congress had in detail, immediately preceding this clause in the same section, provided for opening to settlement. This clause was intended to refer to those lands concerning which it was declared in the page preceding, as follows: "And said lands, except the portions to be alloted as provided in said agreement, shall upon the payment of * * become

and be taken to be and treated as a part of the public domain." The legitimate, fair, unstrained construction of these two portions of this section is that as to all of said lands *which by the terms of this Act became a part of the public domain*, as referred to in this Act, no person should be permitted to enter upon or occupy except in the manner prescribed by the President's proclamation.

The intention of these prohibitory words was, as was stated of similar language construed in the case of *Smith* v. *Townsend*, 148 U. S., 490, to give absolute equality to the intending homesteaders, and this equality was intended to be maintained by requiring the homsteaders to start from the border of the territory that was being opened to settlement at the moment of the opening. These provisions have in recent years been made and have applied only to countries or lands that were being opened to settlement. In no instance have they ever been held to apply to any land that was not being opened to settlement, and the wall described by Justice Brewer in the *Smith* v. *Townsend* decision was a wall around the country being opened to settlement, immediately on the outer boundary of it, and not a wall around some country or land that was not being opened to settlement. It has never been held that it was necessary in the case of the settlers entering Old Oklahoma on April 22, 1889, that they should have run from the eastern border of the Sac and Fox or Kickapoo country, although that was a part of the land lying west of the 96th

meridian, mentioned in this Section 14 of Act of March 2, 1889, and for which the Commission provided for in this section, treated with these tribes of Indians, and was subsequently opened to settlement on September 22, 1891, and was as much included in the prohibitory words of this Section 14 as were the lands of the Osage, Kaw, Ponca, Otoe and Missouri Indians.

If the position taken by plaintiff is correct that the Act of March 2d, 1889, prohibited entry for settlement from any of the lands west of the 96th meridian, then the persons who entered old Oklahoma from any but the southern border were sooners, because "old Oklahoma," the lands opened for settlement on April 23d, 1889, was surrounded by these Indian lands west of the 96th meridian, excepting upon the south side. The Kickapoo and Iowa and Sac and Fox lands lay on the east side of that tract. The Pawnee Reservation and the Cherokee Outlet on the north, and the Cheyenne and Arapahoe and Wichita lands on the west and all of these Indian lands have subsequently been opened to settlement under Acts of Congress approving Treaties made by the Commissioner appointed under this Act of March 2nd, 1889. It certainly never was the intention of Congress that this section 14 should prevent entry of a particular part of these Indian lands west of the 96th meridian, which were at a particular time being opened to settlement, from a portion of other lands adjacent to the lands being opened. It certainly was not the intention to declare that

all persons entering "old Oklahoma" on April 22, 1889, from the east should make the run from the 96th meridian, on the east and from the southern line of the State of Kansas, on the north, and from the State of Texas on the west. This view is, moreover, a wide and radical departure from the lines of construction in this court. Mr. Justice Brewer in defining this same "wall" thus erected by Congress, in the case of *Smith* v. *Townsend*, 148 U.S., 490, placed it upon the borders of the lands opened to settlement on April 22, 1889. If plaintiff's views are correct such location was erroneous to the extent of 40 miles on the east, 60 miles on the north and 100 miles on the west.

Under the authority of the *Smith* v. *Townsend*, the history of that country may be recurred to in considering this cause, and if we recur to the history of the opening of the lands opened to settlement on April 22, 1889, we know that the vast majority of people who entered that country on that day entered from the east, north and west sides. Are those people all "sooners," and have those lands in a great majority of cases gone to illegal entrymen because of the fact that the Act of March 2nd, 1889, prohibited entry from any of the Indian lands west of the 96th meridian? It seems to us that such a claim is preposterous and shows by the absurdity of result produced that the construction claimed by counsel is absolutely untenable.

Moreover, it must be noted that other direct

precedents were made at the opening of the Sac and Fox, Iowa and Pottawatomie Reservations in 1891, and of the Cheyenne and Araphoe Reservations in 1892. At each of these openings the crowds assembled on the immediate borders of the "promised land." To do this they were compelled in many cases to go upon and be upon other reservations west of the 96th meridian that had not been treated for. These lands were acquired from those tribes by treaties made by the commission created by Section 14, of the Act of March 2, 1889, and were governed by its provisions. To this day no one has ever had the temerity to challenge the legality of the presence of these settlers on the adjacent reservations before those openings or to question the legality of their run from those immediate borders.

Furthermore, the prohibition against any one occupying or entering upon "any of the lands herein referred to" is limited by the other clause, "except in the manner prescribed by the proclamation of the President opening the same to settlement," and that proclamation, as hereinbefore shown, placed the inner line of the barrier to entrance or occupancy one hundred feet "within the outer boundaries of the entire tract of country to be opened to settlement." There was no controversy in the *Smith-Townsend* case as to where the outer line or boundary of the country being opened to settlement should be, and that question was not discussed there. The question there was of an entirely different nature. It was as to whether a man was disqualified al-

though he were within the outer boundaries of the entire tract of country that was being opened to settlement on April 22, 1889, if he was not in fact upon the very quarter-section of land upon which he settled that day, or in the particular case, if he were upon a railway right-of-way running through the quarter section.

Neither do we consider that in either the Cherokee Strip Act or the President's Proclamation there was any effort to avoid any "technical questions." In fact, the "technical questions" have been born since this act and proclamation, and are entirely the manufactured product of those diligent minds who have sought to defeat prior occupants upon these homestead lands In fact, it was understood by Congress and by the President that the land or country "known as the Cherokee Outlet"—and we understand that to mean known by the common people of the country as well as by the President and Congress—was meant to describe that piece of country in the present domain of Oklahoma which was not made a part of that Territory by the Organic Act, but which was to become such part when it was opened to settlement. The description of the country "known as the Cherokee Outlet" was worded in such clear and unmistakable terms in the Organic Act, passed less than three years before the Cherokee Strip Act was passed, that it was unquestionably considered by the Congress of the United States and the President, that any technical description of

the land "known as the Cherokee Outlet" was absolutely unnecessary.

It will be observed that the words "Cherokee Outlet" are used in quotation in this Act. This quotation is evidently made from the use of these words in the agreement with the Cherokee Indians transmitted to Congress with the President's Message, known as Executive Document No. 56, and this agreement shows that in the treaty or agreement with the Cherokee Indians, the Cherokee Outlet was not considered as comprising all of the lands west of the 96th meridian. The Indian reservations are expressly referred to and then the remainder of those lands are designated as the "Cherokee Outlet."

In reference to counsel's argument in the court below with reference to technical questions and the bearing that any technical question may have in this case it is worthy of note that when the President came to describe the country "around and immediately within the outer boundaries" of which he was placing the 100 foot strip for the convenience of and to designate the "dead line," so to speak, for the intending settler, he did not use the language which Congress used designating the tract to which it was forever extinguishing any claim of Cherokee title, to wit:—commonly known and called "The Cherokee Outlet," but did use the language contained in the Organic Act of Oklahoma, "known as the Cherokee Outlet." This was evidently done for a purpose and for the reason that the words "Cherokee Outlet" as

contained in this Act of Congress, referred to all of the lands to which the Cherokee Indians were relinquishing their title, not only the lands west of the Reservations, but also any possible shadowy title of the Cherokee Indians to the lands of these Reservations, while the "country known as the Cherokee Outlet," which the President was proclaiming open to settlement, did not include the land in the eastern end of the old Cherokee Outlet to which Indians then held patents and which Congress had not authorized the President to open to settlement.

The one hundred foot reservation is in no wise referred to, or mentioned, in the Act of Congress opening the Cherokee Outlet, or in any acts of Congress referred to by counsel in his brief in the court below. That is entirely a creation of the President under the power given him to fix, and determine and prescribe the manner for opening the lands to settlement, and we agree with counsel that that one hundred foot reservation is positively fixed "around and immediately within the outer boundaries of the entire tract of country to be opened to settlement" under the proclamation. This language, in fact, is so clear that it needs no reference to anything but itself, and its place can be located always and all the time by determining where the outer boundary "of the entire tract of country to be opened to settlement" is, and if the land where any individual attempts to locate this one hundred foot strip is not a part of an "entire tract of country" that was opened to

settlement on September 16, 1893, then the one hundred foot strip does not lie there.

Following this rule which was the one made by the President, the only authority having any power to make it, no one could ever be mistaken or misled by any "*technical question*" relating thereto.

The characterization of counsel in the court below of any of those persons who entered the Cherokee Outlet on September 16, 1893, from the Chillocco Indian reservation, where they were expressly permitted to be and to run from, by the United States troops, and of the very many persons who entered from the Indian reservations on the East side of the strip and have been awarded their lands as legal settlers by the Interior Department, as "25 or 30 who stole into the country in the night time despite the efforts of the soldiers to keep them out" as against the interest of "something like 150,000 people collected upon the boundaries of this country" is incorrect and is not supported by any allegations of the petition or any findings of the Interior Department, and it is an attempt to prejudice this court against a class of people who have never by any branch of the government been held to have crossed the one hundred foot strip around the "country known as the Chereokee Outlet" before twelve o'clock Noon, September 16, 1893.

As heretofore shown, the Department has uniformly and always held that the one hundred foot strip was along the west line of the Ponca,

Osage and other Indian reservations. There never has been any claim made, at least, it is not supported by any findings pleaded in plaintiff's second amended petition, that our client in this case stole into the country in the night time. This controversy between the runners from the one hundred foot strip on the east side of the country opened to settlement and those who ran from the north and south lines has been openly waged, not as a question of secrecy, but wholly as a question of law, in which those in the position of our client have always won when it came to a question of the location of the one hundred foot strip, and excepting one decision which the Department itself overruled, the holdings have been that those running from the one hundred foot strip, or the reservations east thereof, were qualified settlers.

We do not believe that the *ex parte* telegram of the Secretary of the Interior, if sent, to Mendenhall, as claimed by counsel, can be considered by the court in this case. It was not a decision upon any case pending in which any parties had a hearing, or their day in court, and the Interior Department in more than nine years which have elapsed since this alleged telegram, has never vested a title on the strength of it. Certainly, therefore, it would be a weak support for a decision of this court to overturn these titles after the lapse of all these years.

Counsel is mistaken in saying in the court below that the Arkansas river was never referred to in any act of Congress or proclama-

tion of the President, or the decision of any court prior to the Land Department, as an eastern boundary of the "country known as the known as the Cherokee Outlet." The President in the proclamation referred to the "country known as the Cherokee Outlet," as the country that was being opened to settlement. This country was divided into land districts for the convenience of the settlers and the government in the administration of this public business. The Brady-Williams land was in the Perry Land District and that district was bounded and described as "beginning at the middle of the main channel of the Arkansas river, where the same is intersected by the northern boundary of Oklahoma," and thus it was very natural to refer to the middle of that river, where it was adjacent to the country opened to settlement as being the outer boundary of the opened country known as the Cherokee Outlet.

Counsel in his brief below, says, "By Section 9 of the same Act, referring to the Organic Act, the lands east of the Arkansas river are referred to as that portion of the Cherokee Outlet not embraced within the boundaries of the Territory of Oklahoma." This, of course, is the only escape from the conclusion that a designation of the land "known as the Cherokee Outlet" in Section 1 of the Organic Act, was of that part of the land west of the 96th meridian, which was not made a part of the Territory of Oklahoma, such part being then unoccupied by any of the Indian tribes in Oklahoma

Territory. But, is his contention sound? Is it true that the land east of the Arkansas river is the land referred to as "that portion of the Cherokee Outlet not embraced within the boundaries of the Territory of Oklahoma"? We claim not. For all of the lands west of the 96th meridian and east of the Arkansas river were by the Organic Act made a part of the Territory of Oklahoma. A following of the boundaries given in Section 1 of the Organic Act will clearly demonstrate this fact—that there were none of these lands east of the Arkansas river which after the passage of the Organic Act were not a part of the Territory of Oklahoma, and none of the land east of the Arkansas river could have been referred to in the Organic Act as "that portion of the Cherokee Outlet not embraced within the boundaries of said Territory of Oklahoma," but that language in the Organic Act refers to the land which Congress designated as "the land known as the Cherokee Outlet," after it had placed in the Territory of Oklahoma the land lying east therefrom, which was then covered by Indian reservations.

There is nothing in the case of *Jordan* v. *Goldman*, 1 Oklahoma, 427, which throws any light on this case. The stone quarry in controversy in that case was not in any of the Indian reservations which we claim in this case were not part of the land "known as the Cherokee Outlet" at the time the President's proclamation was issued.

Nor do we see any efficacy in the argument that an unbroken border would better have served the purposes and intention of Congress and the President in opening the land known as the Cherokee Outlet to settlement. There is nothing appearing, at least in this case, that would indicate that the President thought that the intending homestead settler could more easily or more readily find, or would be likely to find, a one hundred foot strip in an unoccupied country fifty miles east of the land to be opened to settlement, than he could along the Arkansas River and adjacent Indian Reservations immediately around the outer border of the entire tract of country that was being opened to settlement. Whether the border was broken or unbroken, it appears to us, was of little consequence. Whether that border was on the border of the territory that was being opened to settlement, or fifty miles away from it, was a matter of great consequence. It would, indeed, it appears to us, have been very easy for the President to have described this one hundred foot strip, as being along a particular degree of longitute, he had so intended. If these exact, straight and unbroken boundaries, contended for by the plaintiff, had been the ones which the President intended the homesteader should occupy up to the hour of opening, it would have been very easy to described such border as the south line of Kansas on the north, and the 96th meridian on the east, and from the fact that such easy terms are not used, but that the boundary,

whether broken or unbroken, is described as the one hundred foot strip "around and immediately within the outer boundaries of the entire tract of country to be opened to settlement," indicates that the President intended to place the settler upon the border of that country where he could get an exact and equal opportunity with every other settler, no matter from what direction, east, west, north or south, he might approach the promised land, instead of placing one man on the border of that land and another many miles away, making a difference of equality only in case of location of all settlers on certain sides instead of, as it was intended, the location of any settler upon any side.

The other authorities cited by counsel in his brief in the court below which we have not herein refered to, have, in our judgement, no possible bearing upon this case; so we will not consume time in their discussion.

But this one hundred foot strip could not have been located upon the Indian Reservations east of the land to be opened to settlement without charging the President with using useless words in the Proclamation and language that cannot be harmonized with the rest of the Proclamation. The President in declaring the right of the settler to occupy the one hundred foot strip said:

"Such occupancy shall not be regarded as trespass, or any violation of this Proclamation, or of the law under which it was made; nor shall any settlement rights be gained thereby."

Concerning this language of the Proclama-

tion the Supreme Court of Oklahoma in the decision appealed from says:

"If this strip on the east was from twelve to fifty miles east of the land to be opened to settlemant, why provide that such occupancy shall not be regarded as tresspass, and no settlement right should be gained thereby?"

Certainly if this one hundred foot strip was intended to be by the President placed on the 96th meridian, then it was unecessary to have declared as to that part of the strip lying upon these Indian Reservations, for no settlement rights whatever could be gained upon those Indian Reservation lands that were not opened to settlement.

It is only by abandoning or ignoring the words in the proclamation, "the entire tract of country to be opened to settlement under this proclamation," and by disconnecting them from the terms preceding, "around and immediately within the outer boundaries of," that this proclamation can be made subject to construction. For with these terms as before suggested taken in connection with "the entire tract of country" that was being opened to settlement, there is no difficulty for any man, however untutored in legal phrases he might be, to fix the location of the one hundred foot strip at any point around the country to be opened to settlement.

While, in our view, this case must turn exclusively upon the question of construction of the clause of the proclamation which defines the hundred foot strip, the course of plaintiff's coun-

sel in shifting at this last moment to a reliance upon other prohibitory clauses, and statutes, renders it necessary to consider them at this time.

If that former inhibitory clause is to be held applicable, and such a literal construction given it as counsel for plaintiff now contends for, some startling results must follow:

(1) If this former inhibition is applicable, the President was bound thereby; for, he could make no regulations inconsistent with positive enactment of Congress. The regulation creating the 100 foot strip was, then, without authority of law; for the wall erected by Congress was (if that view be correct) upon the outer boundary of these lands. Every person who entered upon that 100 foot strip, was ***within*** such wall at the hour of the opening. It would follow that every settler in the Cherokee Outlet on the opening day was forever disqualified under this prohibitory provision by the rule of this court in *Smith* v. *Towsend, supra*. Such is one necessary and logical effect flowing from the position assumed by plaintiff's counsel.

(2) If that former inhibitory provision is applicable, and is to be construed so literally as to disqualify Forney because he crossed the Osage reservation before the opening, even a more startling result must follow. The lands west of the 96th meridian directly included within the scope of that same provision, completely surrounded the tract originally opened to settlement on April 22, 1889. There was no way that

any person could reach that tract then opened to settlement, without doing exactly what Forney did,—cross an Indian Reservation covered by that same prohibition. The same is largely true of the lands opened in 1891 and in 1892. If, then, Forney was disqualified by going upon and across one of these reservations, it must follow, that every person who, between March 2, 1889, and September 16, 1893, crossed any reservation west of the 96 meridian, was in like manner disqualified both as to the Cherokee Outlet, and all other lands west of that meridian.

To now broaden the application of this statute, and so strictly enforce it as to disqualiy defendant, is in effect to disqualify every settler in Oklahoma and every person who has ever taken a homestead upon any lands west of the 96th meridian. They all traversed some portion of those lands before the opening just as the defendant did.

Such are the logical and necessary conclusions that must result if this court should adopt the view of the law urged by plaintiff in this case. Surely all just minds will recoil from thus imposing a legal disability upon tens of thousands of settlers who for many years have proceeded in good faith to comply with the homestead law. Surely they are now entitled to rely upon that view of the law which was in effect when their rights attached, and which throughout fourteen years has grown to a rule of property in Oklahoma.

It must go without saying that under these circumstances this court will not overturn the Department's construction of this series of inhibitory clauses, unless that construction is entirely repugnant to both the letter and the spirit of the law. Let us then well consider the general policy of the Land Department in its construction and application of these inhibitory provisions.

In *Woods* v. *Kingfisher* (9 L, D. 432), the earliest case, the Department dwelt at length upon the history of the times out of which these acts grew,and looked closely to the purposes and evils that Congress had in mind in placing them upon the statute books, and thereupon reached this conclusion:

"The evident intention of Congress was to give all persons desiring homes an equal chance to obtain them."

In *Guthrie Townsite* v. *Payne* (12 L. D. 665) it was said:

"In no act relating to the public domain is the intention of Congress more clearly indicated than in the one under consideration, and that intention was to place all citizens on an absolute equality, so far as fixing the time when a claim to land could be asserted and when the initiatory acts toward asserting such claim could be taken."

The Department was in the closest contact with all of the conditions out of which the inhibitory provisions grew. It knew the evils Congress intended to prevent thereby. It fol-

lowed the spirit of the law and gave rigid effect to the purposes of Congress upon the one hand; and wisely avoided the great perils and hardships of enforcing its letter, on the other hand.

From these early cases it has for many years consistently adhered to this policy of construction.

The perils of a literal construction of these provisions were, indeed, so great as to cause this court to make the following suggestion, in the first case that came before it:

"It may be said that if this literal and comprehensive meaning is given to these words, it would follow that any one after March 2, and before April 22, should chance to step within the limits of the Territory, would be forever disqualified from taking a homestead therein. Doubtless he would be within the letter of the statute but, if at the hour of noon on April 22, when the legal barrier was by the President destroyed, he was, in fact, outside the limits of the Territory, it may perhaps be said that, if within the letter, he was not within the spirit of the law, and, therefore, not disqualified.

Smith vs. *Townsend*, 148 U. S. 490.

This timely suggestion from the court of last resort as to the absurd consequences flowing from a strict construction was siezed upon by the Department and for some ten years has formed the express basis of its construction of all the statutes containing these inhibitory provisions. It had come to be known by nearly all settlers, even as early as the opening of the Out-

let, that any mere entrance upon the lands opened to settlement, as crossing it upon the railroad or highway in advance and in the ordinary course of business, was not considered an infraction of the law, Indeed, circumstances compelled everyone to travel across some lands yet to be opened to settlement. Many years intervened before some of the lands included in the original provisions, were treated for, or could be proclaimed opened to settlement. To hold that the "wall" surrounding them was standing there all of these years, so as to prevent everyone from crossing these lands for years before any possibility of an opening existed, was to prevent all access to the settled portion of the Territory. For, every railroad and highway entering Oklahoma crossed some of these lands.

With commendable foresight this court saw the danger and absurdity of this literal construction, and suggested that if a party who had technically violated its letter, "was in fact outside of the Territory" at the time when the legal barrier was removed, he might still be qualified. Certainly at this late date after the policy of construing these laws in accordance with their spirit has grown into a rule of property underlying most of the titles in Oklahoma, this Court should not initiate a policy of "literal and comprehensive" construction.

We insist that the prohibitory clauses found in this immediate Act and Proclamation are the only ones applicable to the case at bar. We base this conclusion upon the Act and Proclamation, and upon the construction placed upon them by the Department during the last nine years. We insist that it was not the purpose or intention of Congress or the President to pile prohibition upon prohibition—that the prohibitions of the immediate act and proclamation being full, complete and exclusive in their terms, were intended to supersede all other provisions of like character. In this we are sustained by the Department's construction of these laws:

"Your office properly held that as to the Cherokee Outlet, the inhibited period dates from the date of the proclamation of the President opening it to settlement, August 19, 1893."

Townsite v. *Morgan, et al.*, 21 L. D., 496, 499.

See also, *Bowles* v. *Frazier*, 22 L. D., 310, 312.

These views and conclusions are also sustained by the fact that while Congress expressly referred to Section 13 of the Act of March 2, 1889, and made that section applicable to the opening of the Outlet, it entirely omitted

any reference to Section 14, of that Act, which contained this original prohibition as to entering these lands. Under the accepted rule, this express inclusion of Section 13 amounts to an exclusion of Section 14.

It was manifestly the intention of Congress and of the President in the Act and Proclamation in question, to make new, full and complete terms of prohibition differing from what had theretofore been imposed. The Department, in administering this part of the law governing the opening has recognized that intention on the part of Congress and the President, and made the Proclamation the exclusive test of qualification or disqualification. It has refused to adopt any such view as opposing counsel would now have this court adopt. It has adhered to the general purpose that Congress and the President had in imposing this prohibition; it has looked to the times, the circumstances, the purposes sought to be accomplished, and the evils sought to be avoided, in construing and applying these provisions of law. It has applied them in a rational and sensible manner so as to effectuate fully the objects and purposes of the law. It has uniformly refused to follow the strict letter of the law, where it led to absurdities, incongruities and impossibilities.

We have not had the benefit of the Brief of counsel for Plaintiff in this Court. The references which we have made to their arguments are to those made in the Oklahoma Courts and not in the Brief here.

We submit the case in absolute confidence of the affirmation of the judgment of the Court below and which we ask.

Very respectfully,

FRANK DALE,
A. G. C. BIERER,

Attorneys for Defendant in Error.

Office Supreme Court U.S.
FILED
NOV 10 1902
JAMES H. McKENNEY,

No. 409.

Consent to advancement.

IN THE

Filed Nov. 10, 1902.

SUPREME COURT

OF THE

United States.

ROBERT L. WINEBRENNER,
Appellant.

vs.

EDWARD C. FORNEY,
Appellee.

No. 409.

CONSENT TO ADVANCEMENT OF CAUSE.

Now comes the appellee, Edward C. Forney, by Frank Dale and A. G. C. Bierer, his attorneys, and hereby enter their appearance in this cause in behalf of the appellee, and said attorneys consent that said cause may be advanced upon the docket and set for hearing on January 19, 1903, or any date prior or subsequent thereto, that

will insure the disposition of the cause at the present term of the court, the brief of counsel for appellant to be served under the rules of this court.

The cause presents a single question for determination by the court, and that is whether or not the appellee is disqualified from entering land in the Cherokee Outlet because of the fact that he entered said Outlet on September 16, 1893, from the boundary of an adjacent Indian reservation, to-wit: the Ponca Reservation.

We know that there is a very large amount of litigation in the courts of Oklahoma that is being carried on because the question of the legality of the entrance into the "country known as the Cherokee Outlet" on September 16, 1893, by intending settlers, from the adjacent Indian reservations, has not been passed upon by the supreme court of the United States. Our client, Edward C. Forney, is, as well as other clients, interested in this question, and the people of Oklahoma interested in it in general, are all very anxious that this question should be passed upon by this court at as speedy a date as possible to the end that their titles may be quieted and that these parties and the courts of Oklahoma may be relieved from a great volume of litigation that can have for its only foundation the fact that this court has not yet finally settled this question by its decision.

Very respectfully submitted,

FRANK DALE,

A. G. C. BIERER,

Attorneys for Appellee.

FILE COPY.

Office Supreme Court U. S.
FILED
MAR 11 1903
JAMES H. McKENNEY,
Clerk.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1902.

ROBERT L. WINEBRENNER
vs.
EDWARD C. FORNEY. } No. 409.

Memorandum of Public Documents Referred to in Argument.

I.

Executive Document No. 27, 53d Congress, 1st Session, House of Representatives, showing:

1. At p. 3, order for use of troops in preventing ingress before time for entry fixed by the proclamation, and in giving effect to requirements of proclamation.

2. Pages 5 *et seq.*, 23, 27, 36 and 37, showing troops used to prevent entry from Indian Reservations.

3. Pages 21, 22, 78–9 and 80, showing runs prohibited from all reservations, that the hundred feet strip could not be laid off on the east side of the Outlet, etc.

II.

Senate Executive Document No. 56, 52nd Congress, 1st Session, showing treaty for cession of certain lands "described, commonly known as the Cherokee Outlet," defined by metes and bounds and also by acreage, both methods of description embracing and including the Indian Reservations. Page 13 shows that the Cherokees had theretofore ceded only a partial interest in the

Indian Reservations, and still retained an interest therein, which was recognized and paid for under the treaty, and that the said reservations were thus, in a tangible sense as well as in common parlance, still a part of the Cherokee Outlet. This executive document also contains, at pp. 20–27, the opinion of the Assistant Attorney General addressed to the Secretary of the Interior, referring, at p. 20, to the entire tract as "what is commonly known as the Cherokee Outlet," the opinion concluding, at p. 27, with the provision ultimately incorporated into Sec. 10 of the Act of March 3, 1893 (27 Stats. at Large, 640), disqualifying from entry any person entering upon "said lands" until they should be opened for settlement, which disqualification it is claimed the defendant in error incurred.

III.

Proclamation of the President opening the Outlet to settlement.

IV.

The opinion of Assistant Attorney-General Hall of August 28, 1892, addressed to the Secretary of the Interior, to the effect that it was the duty of the Secretary to prevent persons from going upon the Indian Reservation to make the "run" on the day of the opening. This opinion wil lbe found quoted in Cagle *v.* Mendenhall, 20 L. D., 447.

V.

Miscellaneous books, Land and Railroad Division, Land Office, Interior Department, showing numerous letters and telegrams from the Secretary and from the Land Commissioner, continuously from the date of the President's proclamation down to the date of the opening, announcing that entrance from the Ponca or any other Indian reservation would forfeit all right to settlement. These miscellaneous books,

we are advised, have not been printed so as to make it possible to file copies, but will be placed at the service of the Court by the Interior Department upon any request to that effect. Specimens of their contents are as follows:

DEPARTMENT OF THE INTERIOR,
OFFICE OF THE ASSISTANT ATTORNEY-GENERAL,
WASHINGTON, *August 26, 1893.*

THE SECRETARY OF THE INTERIOR.

SIR: You request to know whether, in my opinion, you could issue permits to persons to go on the Cherokee Outlet before the day of opening for the purpose of establishing stores, lumber yards, etc. In reply I would say that I have no doubt about your authority to issue such permits. The inhibition found in the act of Congress, approved March 3, 1893, which relates to the opening of the Outlet and its settlement, and in the proclamation of the President is against persons entering contrary to the manner indicated in the act of Congress and by the proclamation for the purpose of settling on the lands in the Outlet and claiming homesteads thereon. If one should come on the Outlet contrary to the manner prescribed in the act of Congress and the proclamation of the President, the only punishment prescribed is that such persons "should forfeit all right to acquire any of said lands." This would indicate clearly that one might go upon the Outlet for any other purpose than entering a homestead; certainly it would be so if such person had the permit of the Secretary of the Interior.

Of course, if persons are permitted to go on the Outlet for the purpose of opening a store or establishing a lumber yard, or for any other purpose, they would be required to file with the proper officer a declaration stating that they would not claim the right to enter homesteads, directly or indirectly, nor aid any person in doing so.

I do not give any opinion as to the propriety and policy of permitting persons to enter on the Outlet for trading purposes before the day of opening, as I regard that a matter wholly within your discretion.

Very respectfully,

JOHN I. HALL,
Assistant Attorney General.

DEPARTMENT OF THE INTERIOR,
WASHINGTON, *August 28, 1893.*

Messrs. HARDING & RIDDELL,
Publishers, etc.,
Arkansas City, Kansas.

GENTLEMEN:

I am in receipt of your favor of the 25th inst., inquiring whether, "under the President's proclamation will settlers be allowed to make the run for claims from the Osage and Ponca Reservation?" That is, you wish to know whether it will be permissible for parties desiring to make homestead entries to go upon the Osage and Ponca Indian Reservations contiguous thereto, for the purpose of entering upon the Outlet at the appointed time. They will not be allowed to do so.

Respectfully,
HOKE SMITH, *Secretary.*

Respectfully submitted,
S. H. HARRIS,
Attorney for Appellant.

J. J. DARLINGTON,
Of Counsel.

Supreme Court of the United States.

No. 409—October Term, 1902.

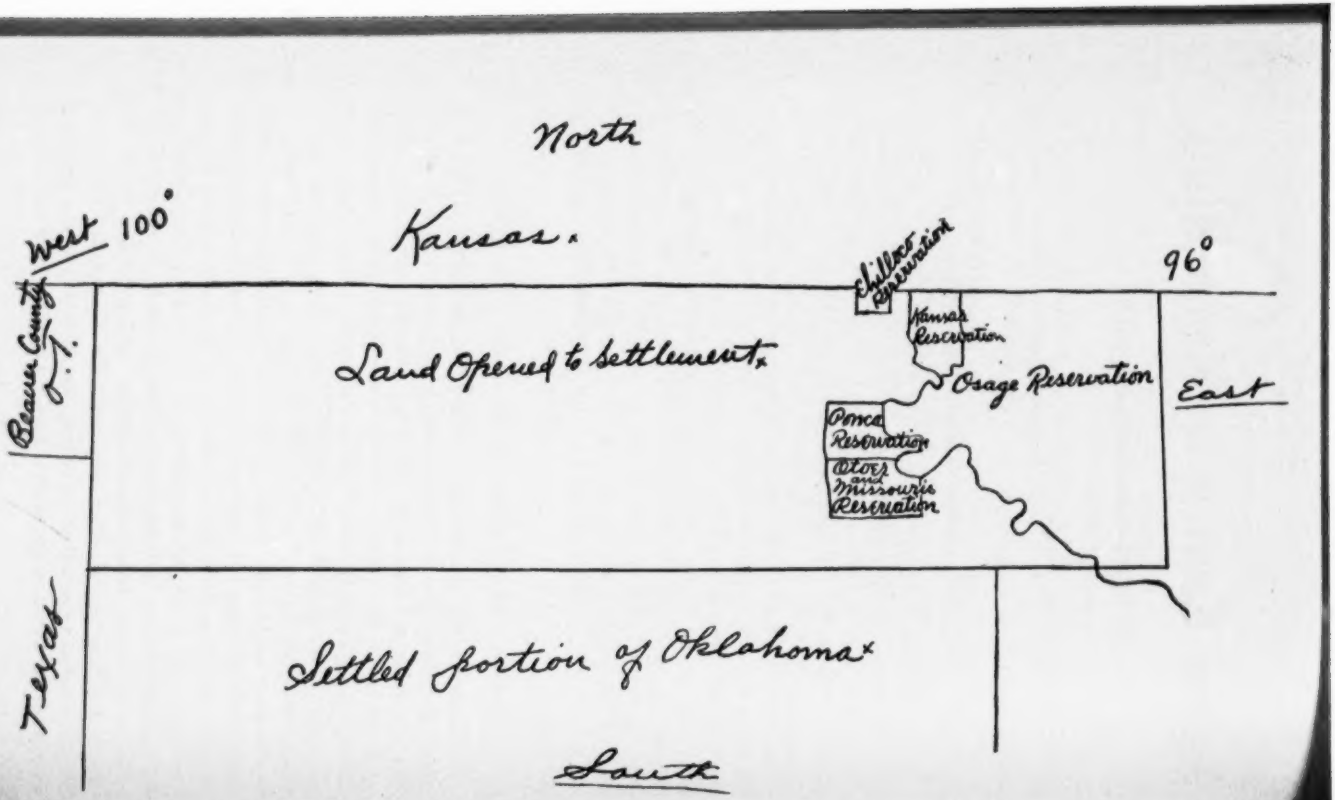
Robert L. Winebrenner, Appellant, vs. Edward C. Forney. } Appeal from the Supreme Court of the Territory of Oklahoma.

[April 6, 1903.]

The appelle holds the government patent to the southwest quarter of section 19, township 26 north, range 1 east, of the Indian meridian in Kay County, Oklahoma Territory. The appellant claimed an equitable right to the land and brought this suit to have the defendant declared a trustee of the title for his benefit. A demurrur to a second amended petition was sustained by the trial court and a decree entered dismissing the suit. This decree was affirmed by the Supreme Court of the Territory, (69 Pac. Rep. 879,) and from that decision this appeal was taken. The tract is within that portion of the Cherokee Outlet opened to settlement by the President's proclamation of August 19, 1893, and the only question as agreed by counsel on both sides, is whether appellee was disqualified by reason of being within prohibited limits on September 16, 1893, the day on which by the President's proclamation the land was opened for settlement.

Mr. Justice Brewer delivered the opinion of the Court.

The President's proclamation, after reciting that the Cherokee Nation of Indians had "ceded, conveyed, transferred, relinquished and surrendered all its title, claim, and interest of every kind and character in and to that part of the Indian Territory bounded on the west by the one hundredth (100) degree of west longitude; on the north by the State of Kansas; on the east by the ninety-sixth (96) degree of west longitude; and on the south by the Creek Nation, the Territory of Oklahoma and the Cheyenne and Arapahoe reservation created or defined by executive order dated August tenth, eighteen hundred and sixty-nine;" and also that Congress had passed an act authorizing the President of the United States to open to settlement any or all lands included in such cession not allotted or reserved, declared that on September 16, 1893, the lands so acquired would be open to settlement, saving and excepting certain specified tracts and portions, including in the latter the Osage, the Kansas, the Ponca, the Otoe and Missouri reservations. The diagram on the opposite page shows in a general way the land first above described as ceded and relinquished


North
West 100°
Kansas.
Chilloc Reservation
96°
Beaver County
O. T.
Land Opened to Settlement.
Kansas Reservation
Osage Reservation
East
Ponca Reservation
Otoe and Missouria Reservation
Texas
Settled portion of Oklahoma.
South

by the Cherokee Indians, the land opened to settlement, and the excepted reservations. The proclamation declared that the land should be opened to settlement "under the terms of and subject to all the conditions, limitations, reservations, and restrictions contained in said agreements, the statutes above specified, the laws of the United States applicable thereto and the conditions prescribed by this proclamation." The act of 1893, (27 Stat. 640, 643,) which is one of the statutes referred to, contained this provision:

"No person shall be permitted to occupy or enter upon any of the lands herein referred to, except in the manner prescribed by the proclamation of the President opening the same to settlement; and any person otherwise occupying or entering upon any of said lands shall forfeit all right to acquire any of said lands. The Secretary of the Interior shall, under the direction of the President, prescribe rules and regulations not inconsistent with this act for the occupation and settlement of said lands, to be incorporated in the proclamation of the President, which shall be issued at least twenty days before the time fixed for the opening of said lands."

And in the President's proclamation it was declared:

"Said lands so to be opened as herein proclaimed, shall be entered upon and occupied only in the manner and under the provisions following, to wit:

"A strip of land, one hundred feet in width, around and immediately within the outer boundaries of the entire tract of country, to be opened to settlement under this proclamation, is hereby temporarily set apart for the following purposes and uses, viz:

"Said strip, the inner boundary of which shall be one hundred feet from the exterior boundary of the country known as the Cherokee Outlet, shall be opened to occupancy in advance of the day and hour named for the opening of said country, by persons expecting and intending to make settlement pursuant to this proclamation. Such occupancy shall not be regarded as trespass, or in violation of this proclamation, or of the law under which it is made; nor shall any settlement rights be gained thereby."

The defendant was on the day named, September 16, 1893, within the limits of the Ponca reservation, and from such reservation went into the territory opened to settlement, and made his homestead entry.

The contention of the plaintiff is that the strip is to be taken as extending around the outer boundaries of the entire tract specified in the cession and relinquishment of the Cherokee Indians, while the contention of the defendant is that it is to be considered as simply around the outer boundaries of the tract opened to settlement. If the contention of the plaintiff is correct the strip on the north, west and south would be immediately contiguous to the land opened to settlement, while on the east it would be a distance of many miles therefrom. If the contention of the defendant is correct it would on all sides be contiguous to such land. There is a manifest equity in the latter contention, especially when we consider the great multitude (according to reports 100,000 and over)

who at the appointed time surrounded this tract with a view of entering the same and obtaining homesteads. And such we think is the true construction of the proclamation. The strip is described as "around and immediately within the outer boundaries of the entire tract of country, to be opened to settlement under this proclamation." If this were all there would be no doubt. The doubt arises from subsequent words, "said strip, the inner boundary of which shall be 100 feet from the exterior boundary of the country known as the Cherokee Outlet." It is contended that what was known as the Cherokee Outlet extended from the ninety-sixth to the one hundredth degree of longitude and included the three or four Indian reservations east of the tract opened to settlement. Undoubtedly this entire tract was originally the Cherokee Outlet. (*Cherokee Nation* v. *Journeycake*, 155 U.S. 196, 206, and treaties cited.) It was originally set apart for the use of the Cherokees as a sort of appurtenance to the 7,000,000 acres specifically granted as their reservation. Subsequently, by various treaties, portions of it were withdrawn from the Cherokees' possession and set apart as reservations for the various tribes named. Still the entire territory was commonly known as the Cherokee Outlet, and was referred to as such in the act of 1893, which ratified the settlement and relinquishment by the Cherokees and authorized the opening to settlement of such portions of the land so ceded and relinquished as the President should determine. There is thus a seeming contradiction between the two clauses of the proclamation. But the first is used in special description of the strip, while the second clause is found in that portion of the proclamation which defines the purposes for which the strip is to be used. As between the two clauses, therefore, the first is entitled to preference, as at that time the attention of the writer must be supposed to have been directed to the location of the strip. But there are other reasons which make more clear the true construction. In addition to the equity referred to heretofore these matters may be noticed: If the strip was within the tract to be opened to settlement it was public land, and the President might well set that apart for temporary occupancy by those who were designing to go into the body of lands to be opened to settlement, whereas if the contention of the plaintiff is correct the President would be setting apart a strip 100 feet in width through lands reserved to certain Indian tribes and allowing a temporary occupancy thereof. We do not mean to deny the power of the President, but it is more reasonable to suppose that he was setting apart a strip of the public domain than a strip of Indian reservations for such temporary occupancy. Further, the last sentence in the paragraph from which the second clause is taken says that the occupancy of the strip "shall not be regarded as trespass, or in violation of this proclamation, or of the law under which it is made; nor shall any settlement rights be gained thereby"—language

which is apt if it described a portion of the larger body of the public domain to be opened to settlement and not apt if it referred to a portion of Indian reservations. The significance of the description "around and immediately within the outer boundaries of the entire tract of country, to be opened to settlement," is found in the purpose to prevent any one from being upon a railroad right of way running through the tract or upon any of the separate quarter sections or sections reserved by the proclamation for school and county purposes within the limits of the entire body. (*Smith* v. *Townsend*, 148 U. S. 490; *Payne* v. *Robertson*, 169 U. S. 323.)

Our conclusions, therefore, are that the contention of the defendant is correct, and that the strip was one which ran around and immediately within the outer boundaries of the entire body of lands opened to settlement.

Such conclusion is in accord with the rulings of the land department. It is true that at or about the time of the opening of the land to settlement there were one or two contradictory orders and dispatches sent out from that department, but these were simply responses to requests for information and made without any hearing from parties interested adversely, and it is also true that in the subsequent consideration of the question there were some differences of opinion between successive Secretaries of the Interior, but the final conclusions were in harmony with the views we have expressed. (*Cagle* v. *Mendenhall*, 20 L. D. 446; 26 L. D. 177; *Welch* v. *Butler*, 21 L. D. 369; *Brady* v. *Williams*, 23 L. D. 533; 25 L. D. 55, 402.)

The judgment of the Supreme Court of Oklahoma is

Affirmed.

Mr. Justice WHITE and Mr. Justice PECKHAM dissented.

True copy.

Test:

Clerk Supreme Court, U. S.